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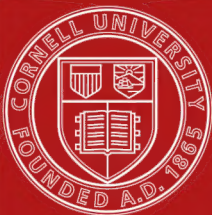
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INTERNATIONAL LAW

CONTRIBUTIONS TO INTERNATIONAL LAW AND DIPLOMACY

Edited by L. OPPENHEIM, M.A., LL.D., late Whewell
Professor of International Law in the University of
Cambridge.

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INTERNATIONAL LAW

A TREATISE

BY L. OPPENHEIM, M.A., LL.D.

FORMERLY WHEWELL PROFESSOR OF INTERNATIONAL LAW IN THE UNIVERSITY OF CAMBRIDGE, MEMBER OF THE INSTITUTE OF INTERNATIONAL LAW, HONORARY MEMBER OF THE ROYAL ACADEMY OF JURISPRUDENCE AT MADRID, CORRESPONDING MEMBER OF THE AMERICAN INSTITUTE OF INTERNATIONAL LAW

VOL. I.—PEACE

THIRD EDITION

EDITED BY

RONALD F. ROXBURGH

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW, FORMERLY WHEWELL SCHOLAR IN THE UNIVERSITY OF CAMBRIDGE, FORMERLY SCHOLAR OF TRINITY COLLEGE, CAMBRIDGE

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P R E F A C E

TO THE THIRD EDITION

LASSA FRANCIS LAWRENCE OPPENHEIM, the author of this book, was born near Frankfurt on March 30, 1858. Educated there, and at the Universities of Berlin, Göttingen, Heidelberg, and Leipzig, he showed great versatility of talent, studying philosophy, medicine, and theology as well as law. Among his teachers were Binding, von Jhering, and Bluntschli. In 1886 he began to lecture in the University of Freiburg, and became Extraordinary Professor there in 1889; he was called to a Professorial Chair at Basle in 1891. During these years he wrote several books, mainly upon Criminal Law. He left Basle for England in 1895, determined to devote the mature years of his life to International Law, which he had then recently been teaching. He studied its varied literature with characteristic energy, and set himself to write this treatise, first published in 1905 and 1906. He was then Lecturer in International Law at the London School of Economics. In 1902 he married a daughter of Lieutenant-Colonel Cowan, and had one daughter, Mary. In 1908 he succeeded Westlake in the Chair founded at Cambridge by William Whewell, and made it his constant aim to fulfil the charge given to the holder 'to lay down such rules and suggest such measures as may tend to diminish the evils of war and finally to extinguish war between nations.' He

was elected an Associate, and then a Member, of the Institute of International Law, and an Honorary Member of the Royal Academy of Jurisprudence at Madrid. As Whewell Professor he devoted himself to the duties of his office, lecturing to large classes and watching with special care over the training of Whewell scholars. All who were thus drawn within his circle were fascinated by his enthusiasm and personal charm. He brought out a second edition of this treatise in 1912, and was writing monographs and contributing articles to many papers. He edited the *Zeitschrift für Völkerrecht* in collaboration with Kohler until the outbreak of the war. In 1909 he had published *International Incidents*—a book of problems for discussion with his pupils. A short study of the *Panama Canal Conflict* was widely read, and with General Edmonds he prepared a manual of *Land Warfare* for the guidance of Officers of His Majesty's Army. His next work was to collect the papers of John Westlake, and to edit a series of contributions to International Law and Diplomacy.

During these Cambridge days his reputation had spread all over the world, and he enjoyed to the full the new opportunity thus brought to him. He sought, and gained easily, the friendship of distinguished jurists everywhere; and through a cordial exchange of opinions he was able to study their varying points of view. For such a work his training in different legal systems had especially fitted him, since his conceptions of jurisprudence were truly international. Visitors came to Whewell House from many lands, and his wife, who shared his interest in his work, his friends, and his pupils, joined in welcoming them to their home. Warmly received, they went and came again. In the

Professor's private room at the Law Schools is a gallery of photographs of international lawyers of almost every nationality.

Then came the war. The guilty diplomacy of Germany, and the crime of the German armies in Belgium, filled him with horror, to which he gave public expression. He had already offered his services to the British Government, and was able to lend his knowledge and prestige towards the overthrow of a system which would have throttled the Law of Nations. The new uses for this book soon exhausted the second edition ; but he would not then publish a third, and confined himself to collecting material and recording the changes which each day brought. He felt that the stress of events was too great for him to mould judgments that should be fashioned in a mind in repose. So he looked to the United States, then at peace, to sustain the legal traditions of International Law during the struggle, and himself became Corresponding Member of the American Institute of International Law in 1915. He also hoped that an American jurist would first tell the legal story of the war, and this hope his friend, Professor Garner of Illinois, has brought to fulfilment. With cautious sympathy he watched the growth of the League of Nations movement, and three lectures which he had delivered upon it were in the press when Germany asked for an armistice.

He at once began to prepare the new edition of this treatise. He was eager to point out that during the World War 'not the whole of International Law has gone to pieces, but only parts of the Law of War,' and that 'the Law of Peace is the centre of gravity of International Law.' But the strain of the war had overtaxed his health, and the ill effects

now revealed themselves. His friends found him in the summer of 1919 with his enthusiasm impaired by physical weariness, and he spoke regretfully of the mass of new material before him. He doubted whether he would live to work through it. At the beginning of August he went to Wales, breaking away from a study of the German Treaty. He had just heard that the University was to confer upon him the degree of Doctor of Letters. Rest and change did not restore him, and he came home dangerously ill. He died on October 7, 1919.

This is no place to set a value upon his achievements, or to voice the affection and esteem of those who knew him. That is being done by his old friend, Edward Arthur Whittuck, to whom the former editions of this treatise were dedicated, in the new *British Year Book of International Law*. His power of insight, his passion for research he gave freely in the cause of the Law of Nations. His optimism, so attractive to all, was tempered by sober understanding. 'I will not deny,' he wrote at the end of the war, 'that the League may fall to pieces; and that a disaster like the present may again visit mankind.' But such thoughts did not deter him. To him labour in International Law was service for humanity; for future generations he could give no more than his best, and would give no less.

It was Oppenheim's practice to work at his book day by day, now rewriting a paragraph, now marking a page for revision in the light of an article or a lecture, now recording new incidents on the ample and well-ordered leaves of his own copy. So it was found when he died; a few chapters, but only a few, were ready for the printer. But now the

rewritten paragraphs, the manuscript notes, have been embodied in the text. To mark each minor change in Oppenheim's words unfortunately proved impracticable, though the attempt was abandoned with reluctance. However, unnecessary changes have been scrupulously avoided, and views and opinions have been nowhere interpolated. So far the task was less difficult. But in July 1919 the author's notes ended; his last unfinished work was upon the German Treaty, then just signed, and many crowded months have since gone by. Mrs. Oppenheim and Mr. Longman desired that the narrative should be brought down to the date of publication, and this has been done by recording events to the end of May 1920. But the reader will not be at a loss to distinguish these notes and paragraphs. They are many that deal with the German Treaty, all that comprise later happenings, and a few others which should here be mentioned. Sections 50*a* and 50*b* were written with some guidance from the author's jottings. Developments within the British Empire made changes in Sections 94*a* and 94*b* inevitable. Sections 197*a* to 197*c* had to be revised to embody the new International Air Convention. The sections dealing with International Commissions and Offices, which the author had marked for revision, have been partly rewritten, in order to incorporate recent events. For the same reason modifications have been made in Section 476*a* (the International Prize Court proposed by the unratified XIIIth Hague Convention), and new matter has been added to Section 476*b* (proposals for an International Court of Justice). In the lists of law-making treaties and of non-political Unions such additions or variations have been made as were rendered necessary by the Peace Conference of 1919. The sections

dealing with the Treaties of Peace and the position of Unions after the World War are not from Oppenheim's pen; but he had himself written the important sections explaining and discussing the League of Nations.

It is too much to hope that the editorial work will always meet with the approval of the reader; doubtless many questions which have been anxiously debated others would have solved differently. But having accepted a responsibility not easy to discharge, I have striven (with what success I do not know) to be guided by reverence and affection for a friend.

Help has come from many quarters, and this is an opportunity for being grateful. The Table of Cases has been prepared, and the Index revised, under the direction of Mr. C. E. A. Bedwell, Keeper of the Middle Temple Library, by his Assistant, Mr. H. A. C. Sturgess; to Messrs. T. and A. Constable, who have come to my aid in proof-reading, a particular debt of gratitude is due.

RONALD F. ROXBURGH.

9 OLD SQUARE, LINCOLN'S INN,
June 29, 1920.

THE WRITINGS OF L. OPPENHEIM ON INTERNATIONAL LAW

I

BOOKS AND MONOGRAPHS

- International Law. A treatise. Longmans, Green and Co.
Vol. i. (Peace) 1905 ; vol. ii. (War) 1906 ; 2nd ed., vols. i. and ii., 1912.
- International Incidents. Cambridge University Press, 1909 ;
2nd ed., 1911.
- Die Zukunft des Völkerrechts. Leipzig, 1911.
- Land Warfare, (in collaboration with Colonel—now General—
J. E. Edmonds). His Majesty's Stationery Office, 1912.
- The Panama Canal Conflict. Cambridge University Press, 1913 ;
2nd ed., 1913.
- The League of Nations and its Problems. Longmans, Green and
Co., 1919.
- Editor of : The Collected English Papers of John Westlake on
Public International Law. Cambridge University Press,
1914.
- Co-Editor of : Zeitschrift für Völkerrecht, vols. i.-viii. (1906-
1914).
- Editor of : Contributions to International Law and Diplomacy.
Longmans, Green and Co.

II

OTHER WRITINGS

- England and Transvaal State Property, (A Letter to *The Times*,
November 24, 1900).
- Zur Lehre von den territorialen Meerbusen, (*Zeitschrift für
Völkerrecht*, vol. i. (1906), pp. 579-587).
- Der Tunnel unter dem Aermelkanal und das Völkerrecht,
(*Zeitschrift für Völkerrecht*, vol. ii. (1907), pp. 1-16).
- The Science of International Law: Its Task and Method,
(*American Journal of International Law*, vol. ii. (1908),
pp. 313-356).

- The Meaning of Coasting Trade in Commercial Treaties, (*Law Quarterly Review*, vol. xxiv. (1908), pp. 328-334).
- Enemy Character after the Declaration of London, (*Law Quarterly Review*, vol. xxv. (1909), pp. 372-384).
- The Declaration of London, (*Quarterly Review*, October 1909, pp. 464-485).
- Die Fischerei in der Moray Firth, (*Zeitschrift für Völkerrecht*, vol. v. (1911), pp. 74-95).
- Introduction to Bentwich, Students' Leading Cases and Statutes on International Law. Sweet and Maxwell, 1913.
- Opinion on the American Institute of International Law, (*Revue générale de Droit international public*, vol. xx. (1913), pp. 108-111).
- Professor Westlake, (*Cambridge Review*, April 24, 1913).
- La Mer territoriale, (*Annuaire de l'Institut de Droit international*, vol. xxvi. (1913), pp. 403-412).
- Das Jahrbuch des Völkerrechts, (*Zeitschrift für Völkerrecht*, vol. viii. (1914), pp. 95-100).
- Die Stellung der feindlichen Kauffarteschiffe im Seekrieg, (*Zeitschrift für Völkerrecht*, vol. viii. (1914), pp. 154-169).
- Zur Lehre vom internationalen Gewohnheitsrecht, (*Zeitschrift für internationales Recht*, vol. xxv. (1915), pp. 1-13).
- A Pot Pourri of International Law, (*Cambridge Review*, January 20 and 27, 1915).
- Introduction to Picciotto, The Relations of International Law to the Law of England and the United States of America. M'Bride, Nast and Co., 1915.
- Introduction to Roxburgh, The Prisoners of War Information Bureau in London. Longmans, Green and Co., 1915.
- Introduction to Satow, A Guide to Diplomatic Practice. Longmans, Green and Co., 1917.
- Introduction to Roxburgh, International Conventions and Third States. Longmans, Green and Co., 1917.
- On War Treason, (*Law Quarterly Review*, vol. xxxiii. (1917), pp. 266-286).
- The Legal Relations between an Occupying Power and the Inhabitants, (*Law Quarterly Review*, vol. xxxiii. (1917), pp. 363-370).
- Opinion concerning a League of Nations, (*The World Court*, February 1918, pp. 74-76).
- 'Le Caractère essentiel de la Société des Nations,' (*Revue générale de Droit international public*, vol. xxvi. (1919), pp. 234-244).

ABBREVIATIONS

OF TITLES OF BOOKS, ETC., QUOTED IN THE TEXT

THE books referred to in the bibliography and notes are, as a rule, quoted with their full titles and the date of their publication. But certain books and periodicals which are very often referred to throughout this work are quoted in an abbreviated form, as follows :—

A.J.	=	The American Journal of International Law.
Annuaire	=	Annuaire de l'Institut de Droit international.
Bluntschli	=	Bluntschli, Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt, 3rd ed. (1878).
Bonfils	=	Bonfils, Manuel de Droit international public, 7th ed. by Fauchille (1914).
Borchard	=	Borchard, The Diplomatic Protection of Citizens Abroad (1915).
Bulmerincq	=	Bulmerincq, Das Völkerrecht (1887).
Calvo	=	Calvo, Le Droit international théorique et pratique, 5th ed. 6 vols. (1888-1896).
Despagnet	=	Despagnet, Cours de Droit international public, 4th ed. by de Boeck (1910).
Field	=	Field, Outlines of an International Code, 2 vols. (1872-1873).
Fiore	=	Fiore, Nouveau Droit international public, deuxième édition, traduite de l'Italien et annotée par Antoine, 3 vols. (1885).
Fiore, <i>Code</i>	=	Fiore, International Law Codified. Translation from the 5th Italian edition by Borchard (1918).
Gareis	=	Gareis, Institutionen des Völkerrechts, 2nd ed. (1901).
Grotius	=	Grotius, De Jure Belli ac Pacis (1625).
Hall	=	Hall, A Treatise on International Law, 7th ed. (1917) by A. Pearce Higgins.
Halleck	=	Halleck, International Law, 4th English ed. by Sir Sherston Baker, 2 vols. (1908).

Hartmann	=	Hartmann, Institutionen des praktischen Völkerrechts in Friedenszeiten (1874).
Heffter	=	Heffter, Das europäische Völkerrecht der Gegenwart, 8th ed. by Geffcken (1888).
Heilborn, <i>System</i>	=	Heilborn, Das System des Völkerrechts entwickelt aus den völkerrechtlichen Begriffen (1896).
Hershey	=	Hershey, The Essentials of International Public Law (1912).
Holland, <i>Studies</i>	=	Holland, Studies in International Law (1898).
Holland, <i>Jurisprudence</i>	=	Holland, The Elements of Jurisprudence, 11th ed. (1910).
Holtzendorff	=	Holtzendorff, Handbuch des Völkerrechts, 4 vols. (1885-1889).
Klüber	=	Klüber, Europäisches Völkerrecht, 2nd ed. by Morstadt (1851).
Lawrence	=	Lawrence, The Principles of International Law, 4th ed. (1910).
Lawrence, <i>Essays</i>	=	Lawrence, Essays on some Disputed Questions of Modern International Law (1884).
Liszt	=	Liszt, Das Völkerrecht, 6th ed. (1910).
Lorimer	=	Lorimer, The Institutes of International Law, 2 vols. (1883-1884).
Maine	=	Maine, International Law, 2nd ed. (1894).
Manning	=	Manning, Commentaries on the Law of Nations, new ed. by Sheldon Amos (1875).
Martens	=	Martens, Völkerrecht, German translation of the Russian original in 2 vols. (1883).
Martens, G. F.	=	G. F. Martens, Précis du Droit des Gens moderne de l'Europe, nouvelle éd. par Vergé, 2 vols. (1858).
Martens, R.	}	These are the abbreviated quotations of the different parts of Martens, Recueil de Traités (see p. 118 of this volume), which are in common use.
Martens, N.R.		
Martens, N.S.		
Martens, N.R.G.		
Martens, N.R.G. 2nd Ser.		
Martens, N.R.G. 3rd Ser.		
Martens, <i>Causes célèbres</i>	=	Martens, Causes célèbres du Droit des Gens, 5 vols., 2nd ed. (1858-1861).
Mérignhac	=	Mérignhac, Traité de Droit public international, vol. i. (1905), vol. ii. (1907), vol. iii. (1912).

Moore	=	Moore, A Digest of International Law, 8 vols., Washington (1906).
Nys	=	Nys, Le Droit international, 3 vols. 2nd ed. (1912).
Perels	=	Perels, Das internationale öffentliche Seerecht der Gegenwart, 2nd ed. (1903).
Phillimore	=	Phillimore, Commentaries upon International Law, 4 vols. 3rd. ed. (1879-1888).
Piedelièvre	=	Piedelièvre, Précis de Droit international public, 2 vols. (1883-1895).
Praag	=	L. van Praag, Jurisdiction et Droit international public (1915).
Pradier-Fodéré	=	Pradier-Fodéré, Traité de Droit international public, 8 vols. (1885-1906).
Pufendorf	=	Pufendorf, De Jure Naturae et Gentium (1672).
Reddie	=	Reddie, Researches Historical and Critical in Maritime International Law, 2 vols. (1844).
R.G.	=	Revue générale de Droit international public.
R.I.	=	Revue de Droit international et de Législation comparée.
Rivier	=	Rivier, Principes du Droit des Gens, 2 vols. (1896).
Satow	=	Satow, A Guide to Diplomatic Practice, 2 vols. (1917).
Taylor	=	Taylor, A Treatise on International Public Law (1901).
Testa	=	Testa, Le Droit public international maritime, traduction du Portugais par Bourtiron (1886).
Twiss	=	Twiss, The Law of Nations, 2 vols. 2nd ed. (1884, 1875).
Ullmann	=	Ullmann, Völkerrecht, 2nd ed. (1908).
Vattel	=	Vattel, Le Droit des Gens, 4 books in 2 vols., nouvelle éd. (Neuchâtel, 1773).
Walker	=	Walker, A Manual of Public International Law (1895).
Walker, <i>History</i>	=	Walker, A History of the Law of Nations, vol. i. (1899).
Walker, <i>Science</i>	=	Walker, The Science of International Law (1893).
Westlake	=	Westlake, International Law, 2 vols. 2nd ed. (1910-1913).

Westlake, <i>Papers</i>	=	The Collected Papers of John Westlake on Public International Law, ed. by L. Oppenheim (1914).
Wharton	=	Wharton, A Digest of the International Law of the United States, 3 vols. (1886).
Wheaton	=	Wheaton, Elements of International Law, 8th American ed. by Dana (1866).
Z.I.	=	Zeitschrift für internationales Recht.
Z.V.	=	Zeitschrift für Völkerrecht.

Treaty of Peace with Germany	=	Treaty of Peace between the Allied and Associated Powers and Germany, signed at Versailles on June 28, 1919.
Treaty of Peace with Austria	=	Treaty of Peace between the Allied and Associated Powers and Austria, signed at Saint-Germain-en-Laye on September 10, 1919.
Treaty of Peace with Bulgaria	=	Treaty of Peace between the Allied and Associated Powers and Bulgaria, signed at Neuilly-sur-Seine on November 27, 1919.
Treaty with Poland	=	Treaty of Peace between the United States of America, the British Empire, France, Italy, Japan (the Principal Allied and Associated Powers), and Poland, signed at Versailles on June 28, 1919.
Treaty with Czecho-Slovakia	=	Treaty between the Principal Allied and Associated Powers and Czecho-Slovakia, signed at St. Germain-en-Laye on September 10, 1919.
Treaty with the Serb-Croat- Slovene State	=	Treaty between the Principal Allied and Associated Powers and the Serb-Croat-Slovene State, signed at St. Germain-en-Laye on September 10, 1919, by the parties except the Serb-Croat-Slovene State, which acceded on December 5, 1919.
Treaty with Roumania	=	Treaty between the Allied and Associated Powers and Roumania, signed at Paris on December 9, 1919.

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- Anna, The*, (1805) 5 C. Rob. 373. § 234, p. 393.
- Arkansas, State of v. Tennessee, State of*, (1918) 246 U.S. 158. § 199, p. 361.
- Attorney-General, Markwald v.*, [1918] 1 K.B. 617 ; (1920) 36 T.L.R. 197. § 293, p. 464.
- Barenfels, The*, (1915) 1 B. and C.P.C. 102, 122 ; (1916) 2 B. and C.P.C. 36. § 183, p. 328.
- Bartram v. Robertson*, (1887) 122 U.S. 116. § 580, p. 750.
- Becker, Viveash v.*, (1814) 3 M. & S. 284. § 434, p. 600.
- Belgenland, The*, (1885) 114 U.S. 355. § 265, p. 428.
- Best, Taylor v.*, (1854) 14 C.B. 487. § 391, p. 569.
- Blanco, Wilson v.*, (1889) 56 N.Y. Super. Ct. 582. § 398, p. 575.
- Bolivia, Republic of v. Indemnity Mutual Marine Assurance Co.*, [1909] 1 K.B. 785. § 272, p. 434.
- Bolivia, Republic of, Exploration Syndicate, Ltd., In re*, [1914] 1 Ch. 139. § 402, p. 579.
- Botiller v. Dominguez*, (1888) 130 U.S. 238. § 546, p. 696.
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- Broadmayne, The*, [1916] P. 64. § 450, p. 614.
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- Chambers, Kennett v.*, (1852) 14 Howard 38. § 75, p. 139.
- Charkieh, The*, (1873) L.R. 4 A. & E. 59. § 91, p. 165 ; § 450, p. 614.

- Charlton v. Kelly*, (1913) 229 U.S. 447. § 330, p. 508; § 547, pp. 696, 697.
- Chartered Mercantile Bank of India, London, and China v. Netherlands Indian Steam Navigation Co.*, (1883) 10 Q.B.D. 537. § 265, p. 428.
- Cherokee Tobacco, The*, (1870) 11 Wall. 616. § 546, p. 696.
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- Commanding Officer, —th Battalion, Middlesex Regiment, R. v.*, (1917) 33 T.L.R. 252. § 302, p. 473.
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- Crimdon, The*, (1918) 35 T.L.R. 81. § 450, p. 614.
- Cunningham, R. v.*, (1859) Bell C.C. 86. § 194, p. 348.
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- De Jager v. Natal, Attorney-General for*, [1907] A.C. 326. § 317, p. 493.
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- Enterprise, The*, (1855) Moore, *Arbitrations*, p. 4349. § 189, p. 340.
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- Fama, The*, (1804) 5 C. Rob. 106. § 217, p. 379.
- Francis, R. v., ex parte Markwald*, [1918] 1 K.B. 617; (1920) 36 T.L.R. 197. § 293, p. 464.
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- Gagara, The*, [1919] P. 95. § 450, p. 614.
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- Gutenfels, The; The Barenfels; The Derfflinger*, (1915) 1 B. and C.P.C. 102, 122; (1916) 2 B. and C.P.C. 36. § 183, p. 328.

- Habana, The.* See *Paquete Habana, The.*
- Hall, Campbell v.*, (1774) 1 Cowper 208. § 240, p. 398.
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INTRODUCTION

FOUNDATION AND DEVELOPMENT OF THE LAW OF NATIONS

CHAPTER I

FOUNDATION OF THE LAW OF NATIONS

I

THE LAW OF NATIONS AS LAW

Hall, pp. 13-16—Maine, pp. 50-53—Lawrence, §§ 1-3, and *Essays*, pp. 1-36—Phillimore, i. §§ 1-12—Twiss, i. §§ 104-105—Taylor, § 2—Moore, i. §§ 1-2—Westlake, i. pp. 1-13, and *Papers*, pp. 392-413—Walker, *History*, i. §§ 1-8—Halleck, i. pp. 50-59—Hershey, Nos. 1-10—Ullmann, §§ 2-4—Heffter, §§ 1-5—Holtzendorff in *Holtzendorff*, i. pp. 19-26—Nys, i. pp. 138-151—Rivier, i. § 1—Bonfils, Nos. 26-31—Pradier-Fodéré, i. Nos. 1-23—Mérignhac, i. pp. 5-28—Martens, i. §§ 1-5—Fiore, i. Nos. 186-208, and *Code*, Nos. 1-31—Bulmerincq, *Praxis, Theorie und Codification des Völkerrechts* (1874), pp. 158-164—Higgins, *The Binding Force of International Law* (1910)—Heilborn, *Grundbegriffe des Völkerrechts* (1912), §§ 1-5—Grosch, *Der Zwang im Völkerrecht* (1912), pp. 1-38, 109-137—Redslob, *Das Problem des Völkerrechts* (1917)—Lammasch, *Das Völkerrecht nach dem Kriege* (1917), pp. 61-91—Praag, Nos. 1-3—Pollock in the *Law Quarterly Review*, xviii. (1902), pp. 418-429—Scott in *A.J.*, i. (1907), pp. 831-866—Willoughby and Root in *A.J.*, ii. (1908), pp. 357-365 and 451-457—Nys in *A.J.*, vi. (1912), pp. 1-29, 279-315—Munroe Smith, *The Nature and Future of International Law* in the *American Political Science Review*, xxii. (1918)—Foulke in the *Columbia Law Review*, xix. (1919), pp. 429-466.

§ 1. Law of Nations or International Law (*Droit des gens*, *Völkerrecht*) is the name for the body of customary and conventional rules which are considered legally binding by civilised States in their intercourse with each other. Such part of these rules as is binding upon all the civilised States without exception, as, for instance, the law connected with legation and treaties, is called *universal* International Law, in contradistinction to *particular* International Law, which is binding on two

Concep-
tion of the
Law of
Nations.

¹ In contradistinction to mere International Comity. See below, usages and to rules of so-called §§ 9 and 19.

or a few States only. But it is also necessary to distinguish *general* International Law. This name must be given to the body of such rules as are binding upon a great many States, including leading Powers. General International Law, as, for instance, the Declaration of Paris of 1856, has a tendency to become universal International Law.

International Law in the meaning of the term as used in modern times did not exist during antiquity and the first part of the Middle Ages. It is in its origin essentially a product of Christian civilisation, and began gradually to grow from the second half of the Middle Ages. But it owes its existence as a systematised body of rules to the Dutch jurist and statesman Hugo Grotius, whose work, *De Jure Belli ac Pacis, libri iii.*, appeared in 1625, and became the foundation of all later development.

The Law of Nations is a law for the intercourse of States with one another, not a law for individuals. As, however, there cannot be a sovereign authority above the several sovereign States, the Law of Nations is a law *between*, not *above*,¹ the several States, and is, therefore, since Bentham, also called 'International Law.'

Since the distinction of Bentham between International Law public and private has been generally accepted, it is necessary to emphasise that only the so-called public International Law, which is identical with the Law of Nations, is International Law, whereas the so-called private International Law is not, at any rate not yet. The latter concerns such matters as fall at the same time under the jurisdiction of two or more different States. And as the Municipal Laws of different States are frequently in conflict with each other respect-

¹ The arguments used by Snow (see *A.J.*, vi. (1912), pp. 890-900, and *R.G.*, xix. (1912), pp. 309-318) against the term *International Law*, and his

proposal to substitute for it the term *Supernational Law*, are based upon the untenable *dictum* that 'all law comes from above.'

ing such matters, jurists belonging to different countries endeavour to find a body of principles according to which such conflicts can be avoided. What is now termed private International Law would, however, become International Law in case the Powers agreed by a law-making treaty upon a body of rules the application of which would solve such conflicts.

§ 2. Almost from the beginning of the science of the Law of Nations the question has been discussed whether the rules of International Law are *legally* binding. Hobbes¹ and Pufendorf² had already answered the question in the negative. And during the nineteenth century Austin³ and his followers took up the same attitude. They defined law as a body of rules for human conduct set and enforced by a sovereign political authority. If indeed this definition of law be correct, the Law of Nations cannot be called law. For International Law is a body of rules governing the relations of sovereign States between one another. And there is not and cannot be a sovereign political authority above the sovereign States which could enforce such rules. However, this definition of law is not correct. It covers only the written or statute law within a State, that part of the Municipal Law which is expressly made by statutes of Parliament in a constitutional State or by some other sovereign authority in a non-constitutional State. It does not cover that part of Municipal Law which is termed unwritten or customary law. There is, in fact, no community and no State in the world which could exist with written law only. Everywhere there is customary law in existence besides the written law. This customary law was never expressly enacted by any law-giving body, or it would not be

Legal
Force of
the Law of
Nations
contested.

¹ *De Cive*, xiv. 4.

² *De Jure Naturae et Gentium*, ii. c. iii. § 22.

³ *Lectures on Jurisprudence*, vi.

merely customary law. Those who define law as rules set and enforced by a sovereign political authority do not deny the existence of customary law. But they maintain that the customary law has the character of law only through that indirect recognition on the part of the State which is to be found in the fact that courts of justice apply the customary in the same way as the written law, and that the State does not prevent them from doing so. This is, however, nothing else than a fiction. Courts of justice having no law-giving power could not recognise unwritten rules as law if these rules were not law before that recognition, and States recognise unwritten rules as law only because courts of justice do so.

Charac-
teristics
of Rules
of Law.

§ 3. For the purpose of finding a correct definition of law it is indispensable to compare morality and law with each other, for both lay down rules, and to a great extent the same rules, for human conduct. Now the characteristic of rules of morality is that they apply to conscience, and to conscience only. An act loses all value before the tribunal of morality, if it was not done out of free will and conscientiousness, but was enforced by some external power or was done from some consideration which lies without the boundaries of conscience. Thus, a man who gives money to the hospitals in order that his name shall come before the public does not act morally, and his deed is not a moral one, though it appears to be one outwardly. On the other hand, the characteristic of rules of law is that they shall, if necessary, be enforced by external power.¹ Rules of law apply, of course, to conscience quite as much as rules of morality. But the latter require to be enforced by the internal power of conscience only,

¹ Westlake, *Papers*, p. 12, seems to make the same distinction between rules of law and of morality,

and Twiss, i. § 105, adopts it *expressis verbis*.

whereas the former require to be enforced by some external power. When, to give an illustrative example, morality commands you to pay your debts, it hopes that your conscience will make you pay them. On the other hand, if the law gives the same command, it hopes that, if the conscience has not sufficient power to make you pay your debts, the fact that, if you will not pay, the bailiff will come into your house, will do so.¹

§ 4. If these are the characteristic signs of morality and of law, we are justified in stating the principle: A rule is a rule of morality, if by common consent of the community it applies to conscience and to conscience only; whereas, on the other hand, a rule is a rule of law, if by common consent of the community it shall eventually be enforced by external power. Without some kind both of morality and law, no community has ever existed, or could possibly exist. But there need not be, at least not among primitive communities, a law-giving authority within a community. Just as the rules of morality are growing through the influence of many different factors, so the law can grow without being expressly laid down and set by a law-giving authority. Wherever we have an opportunity of observing a primitive community, we find that some of its rules for human conduct apply to conscience only, whereas others shall by common consent of the community be enforced; the former are rules of morality only, whereas the latter are rules of law. For the existence of law neither a law-giving authority nor courts of justice are essential. Whenever a question of law arises in a primitive community, it is the community itself and not a court which decides it. Of

Law-giving Authority not essential for the Existence of Law.

¹ This distinction between rules of law and of morality is, however, by no means generally recognised, for there are many writers (see, for instance, Heilborn, *Grundbegriffe des*

Völkerrechts (1912), pp. 3-10) who deny to the rules of law the essential characteristic that they shall, if necessary, be enforced by external power.

course, when a community is growing out of the primitive condition of its existence and becomes gradually so enlarged that it turns into a State in the sense proper of the term, the necessities of life and altered circumstances of existence do not allow the community itself any longer to do anything and everything. And the law can now no longer be left entirely in the hands of the different factors which make it grow gradually from case to case. A law-giving authority is now just as much wanted as a governing authority. It is for this reason that we find in every State a Legislature, which makes laws, and courts of justice, which administer them.

However, if we ask whence does the power of the Legislature to make laws come, there is no other answer than this : from the common consent of the community. Thus, in Great Britain, Parliament is the law-making body by common consent. An Act of Parliament is law, because the common consent of Great Britain is behind it. That Parliament has law-making authority is law itself, but unwritten and customary law. *Thus the very important fact comes to light that all statute or written law is based on unwritten law in so far as the power of Parliament to make statute law is given to Parliament by unwritten law.* It is by the common consent of the British people that Parliament has the power of making rules which shall be enforced by external power. But besides the statute laws made by Parliament there exist and are constantly growing other laws, unwritten or customary, which are day by day recognised through courts of justice.

Definition
and three
Essential
Condi-
tions of
Law.

§ 5. On the basis of the results of these previous investigations we are now able to give a definition of law. We may say that *law is a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power.*

The essential conditions of the existence of law are, therefore, threefold. There must, first, be a community. There must, secondly, be a body of rules for human conduct within that community. And there must, thirdly, be a common consent of that community that these rules shall be enforced by external power. It is not an essential condition either that such rules of conduct should be written rules, or that there should be a law-making authority or a law-administering court within the community concerned. And it is evident that, if we find this definition of law correct, and accept these three essential conditions of law, the existence of law is not limited to the State community only, but is to be found everywhere where there is a community. The best example of the existence of law outside the State is the law of the Roman Catholic Church, the so-called Canon Law. This Church is an organised community whose members are dispersed over the whole surface of the earth. They consider themselves bound by the rules of the Canon Law, although there is no sovereign political authority that sets and enforces those rules, the Pope and the bishops and priests being a religious authority only. But there is an external power through which the rules of the Canon Law are enforced—namely, the punishments of the Canon Law, such as excommunication, refusal of sacraments, and the like. And the rules of the Canon Law are in this way enforced by common consent of the whole Roman Catholic community.

§ 6. But it must be emphasised that, if there is law to be found in every community, law in this meaning must not be identified with the law of States, the so-called Municipal Law,¹ just as the conception of State

Law not to be identified with Municipal Law.

¹ Throughout this work the term 'Municipal Law' is made use of in the sense of national or State law

in contradistinction to International Law.

must not be identified with the conception of community. The conception of community is a wider one than the conception of State. A State is a community, but not every community is a State. Likewise the conception of law pure and simple is a wider one than that of Municipal Law. Municipal Law is law, but not every law is Municipal Law, as, for instance, the Canon Law is not. Municipal Law is a narrower conception than law pure and simple. The body of rules which is called the Law of Nations or International Law might, therefore, be law in the strict sense of the term, although it might not possess the characteristics of Municipal Law. To make sure whether the Law of Nations is or is not law, we have to inquire whether the three essential conditions of the existence of law are to be found in the Law of Nations.

The
'Family
of Na-
tions'
a Com-
munity.

§ 7. As the first condition is the existence of a community, the question arises, whether an international community exists whose law could be the Law of Nations. Before this question can be answered, the conception of a community must be defined. A community may be said to be the body of a number of individuals more or less bound together through such common interests as create a constant and manifold intercourse between the single individuals. This definition of a community covers not only a community of individual men, but also a community of individual communities such as individual States. But is there a universal international community of all individual States in existence? This question had already, before the World War, been decided in the affirmative as far as the States of the civilised world were concerned. Innumerable were the interests which then already knit all the individual civilised States together and which created constant intercourse between these States as well as between their subjects. As the civilised States were,

with only a few exceptions, Christian States, there were already religious ideas winding a band around them. There were, further, science and art, which are by their nature to a great extent international, and which created a constant exchange of ideas and opinions between the subjects of the several States. Of the greatest importance were, however, agriculture, industry, and trade. It is impossible even for the largest empire to produce everything its subjects want. Therefore, the productions of agriculture and industry must be exchanged by the several States, and it is for this reason that international trade is an unequalled factor for the welfare of every civilised State. Even in antiquity, when every State tried to be a world in itself, States did not, and could not, exist without some sort of international trade. It is international trade which has created navigation on the high seas and on the rivers flowing through different States. It is, again, international trade which has called into existence the nets of railways which cover the continents, the international postal and telegraphic arrangements, and the Transatlantic telegraphic cables.¹

The manifold interests which knit all the civilised States together and create a constant intercourse between one another, have long since brought about the necessity that these States should have one or more official representatives living abroad. Thus we find everywhere foreign envoys and consuls. They are the agents who make possible the current stream of transactions between the Governments of the different States. A number of International Offices, International Bureaux, International Commissions have been permanently appointed for the administration of

¹ See Fried, *Das internationale Leben der Gegenwart* (1908), where the innumerable interests are grouped

and discussed which already before the World War knit the civilised States together.

international business, and a Permanent Court of Arbitration has been established at the Hague. Though the individual States are sovereign and independent of each other, though there is no international Government above the national ones, though there is no central political authority to which the different States are subjected, yet there is something mightier than all the powerful separating factors: namely, the common interests. And these common interests and the necessary intercourse which serves these interests, have long since united the separate States into an indivisible community. For many hundreds of years this community has been called 'Family of Nations' or 'Society of Nations.' But while before the World War the Family of Nations rested only on the basis of custom, and entirely lacked any organisation whatever, the Treaties of Peace, by establishing a League intended to comprise all civilised States, turned the unorganised Family of Nations into an organised community of States.

The
'Family
of Na-
tions' a
Commu-
nity with
Rules of
Conduct.

§ 8. Thus the first essential condition for the existence of law is a reality. The single States make altogether a body of States, a community of individual States. But the second condition cannot be denied either. For hundreds of years more and more rules have grown up for the conduct of the States between each other. These rules are to a great extent customary rules. But side by side with these customary and unwritten rules more and more written rules are daily created by international agreements, such as the Declaration of Paris of 1856, the Hague Rules concerning land warfare of 1899 and 1907, and the like. The so-called Law of Nations is nothing else than a body of customary and conventional¹ rules regulating the conduct of the individual States with each other.

¹ The term 'conventional rule' is used throughout this work to in-

dicate a rule created by express agreement.

§ 9. But how do matters stand concerning the third essential condition for the existence of law? Is there a common consent of the community of States that the rules of international conduct shall be enforced by external power? There cannot be the slightest doubt that this question must be affirmatively answered. The heads of the civilised States, their Governments, their Parliaments, and the public opinion of the whole of civilised humanity, agree and consent that the body of rules for international conduct which is called the Law of Nations shall, if necessary, be enforced by external power, in contradistinction to rules of international morality and courtesy, which are left to the consideration of the conscience of nations. In the absence of a central authority for the enforcement of the rules of the Law of Nations, the States have to take the law into their own hands. Self-help and intervention on the part of other States which sympathise with the wronged one are the means by which the rules of the Law of Nations can be and actually are enforced. And by the establishment of the League of Nations there is now more reason to hope than in former times that the smaller and weaker States will not be at the mercy of the larger and stronger Powers, in case of a conflict between their interests. For, according to the Covenant of the League of Nations, the League has been created, among other purposes, for 'the firm establishment of the understandings of International Law as the actual rule of conduct among Governments.' It is true that there is no central Government above the Governments of the several States, which could in every case secure the enforcement of the rules of International Law. For this reason, compared with Municipal Law and the means available for its enforcement, the Law of Nations is certainly the weaker of the two. A law is the stronger, the more guarantees are given that it can and will be

External
Power for
the En-
forcement
of Rules of
Interna-
tional
Conduct.

enforced. Thus, the law of a State which is governed by an uncorrupt Government and the courts of which are not venal is stronger than the law of a State which has a corrupt Government and venal judges. It is inevitable that the Law of Nations must be a weaker law than Municipal Law, as there is not, and cannot be, an international Government above the national ones which could enforce the rules of International Law in the same way as a national Government enforces the rules of its Municipal Law. This weakness becomes particularly conspicuous in time of war, for belligerents who fight for their existence will always be apt to brush aside such rules of the Law of Nations concerning warfare as are supposed to hinder them in the conduct of their military operations. But a weak law is nevertheless still law, and the Law of Nations is by no means so weak a law as it sometimes seems to be. Those who deny to International Law the character of law because they identify the conception of law in general with that of Municipal Law and because they cannot see any law outside the State, confound cause and effect. Originally law was not a product of the State, but the State was a product of law. The right of the State to make law is based upon the rule of law that the State is competent to make law.

Practice
recognises
Law of
Nations as
Law.

§ 10. The fact is that theorists only are divided concerning the character of the Law of Nations as real law. In practice International Law is constantly recognised as law. The Governments and Parliaments of the different States are of opinion that they are legally, as well as morally bound by the Law of Nations. Likewise, public opinion of all civilised States considers every State legally bound to comply with the rules of the Law of Nations, not taking notice of the opinion of those theorists who maintain that the Law of Nations does not bear the character of real law. And the several

States not only recognise the rules of International Law as legally binding in innumerable treaties, but emphasise every day the fact that there is a law between themselves. They moreover recognise this law by their Municipal Laws ordering their officials, their civil and criminal courts, and their subjects to take up such an attitude as is in conformity with the duties imposed upon their sovereign by the Law of Nations. If a violation of the Law of Nations occurs on the part of an individual State, public opinion of the civilised world, as well as the Governments of other States, stigmatise such violation as a violation of law pure and simple. And countless treaties concerning trade, navigation, post, telegraph, copyright, extradition, and many other objects exist between civilised States, which treaties, resting entirely on the existence of a law between the States, presuppose such a law, and contribute by their very existence to its development and growth.

Violations of this law are certainly frequent, especially during war. But the offenders always try to prove that their acts do not constitute a violation, and that they have a right to act as they do according to the Law of Nations, or at least that no rule of the Law of Nations is against their acts. Has a State ever confessed that it was going to break the Law of Nations or that it ever did so? The fact is that States, in breaking the Law of Nations, never deny its existence, but recognise its existence through the endeavour to interpret the Law of Nations in a way favourable to their act.¹ And there is an

¹ Thus when, in August 1914, Germany began the World War by attacking neutralised Belgium, she pleaded the necessity of self-preservation as an excuse. When, in 1915, she everywhere made use of poisonous gases, she pleaded that the French had made use of projectiles, the sole

object of which was the diffusion of asphyxiating gases. Again, when she ordered her submarines to torpedo the *Lusitania* and thereby drowned over 1100 innocent men, women and children, she pleaded that the act was lawful as one of reprisals.

ever-growing tendency to bring disputed questions of International Law as well as international differences in general before international courts and councils. According to the Covenant of the League of Nations, the members of the League are bound, if there should arise between them a dispute likely to lead to a rupture, to submit the matter to arbitration, or to an inquiry by the Council of the League, and in no case are they allowed to go to war, until three months after the award of the arbitrators or the report by the Council.

II

BASIS OF THE LAW OF NATIONS

Common
Consent
the Basis
of Law.

§ 11. If law is, as defined above (§ 5), a body of rules for human conduct within a community which by common consent of this community shall be enforced through external power, common consent is the basis of all law. What, now, does the term 'common consent' mean? If it meant that all the individuals who are members of a community must at every moment of their existence expressly consent to every point of law, such common consent would never be a fact. The individuals, who are the members of a community, are successively born into it, grow into it together with the growth of their intellect during adolescence, and die away successively to make room for others. The community remains unaltered, although a constant change takes place in its members. 'Common consent' can therefore only mean the express or tacit consent of such an overwhelming majority of the members that those who dissent are of no importance whatever, and disappear totally from the view of one who looks for the will of the community as an entity in contradistinction

to the wills of its single members. The question as to whether there be such a common consent in a special case, is not a question of theory, but of fact only. It is a matter of observation and appreciation, and not of logical and mathematical decision, just as is the well-known question, How many grains make a heap? Those legal rules which come down from ancestors to their descendants remain law so long as they are supported by the common consent of these descendants. New rules can only become law if they find common consent on the part of those who constitute the community at the time. It is for that reason that custom is at the background of all law, whether written or unwritten.

§ 12. What has been stated with regard to law pure and simple applies also to the Law of Nations. However, the community for which this Law of Nations is authoritative consists not of individual human beings, but of individual States. And whereas in communities consisting of individual human beings there is a constant and gradual change of the members through birth, death, emigration, and immigration, the Family of Nations is a community within which no such constant change takes place, although now and then a member disappears and a new member steps in. The members of the Family of Nations are therefore not born into that community and they do not grow into it. New members are simply received into it through express or tacit recognition. It is therefore necessary to scrutinise more closely the common consent of the States which is the basis of the Law of Nations.

Common
Consent
of the
Family of
Nations
the Basis
of Inter-
national
Law.

The customary rules of this law have grown up by common consent of the States—that is, the different States have acted in such a manner as includes their tacit consent to these rules. As far as the process of the growth of a usage and its turning into a custom

can be traced back, customary rules of the Law of Nations came into existence in the following way. The intercourse of States with each other necessitated some rules of international conduct. Single usages, therefore, gradually grew up, the different States acting in the same or in a similar way when an occasion arose. As some rules of international conduct were from the end of the Middle Ages urgently wanted, the writers on the Law of Nature prepared the ground for their growth by constructing certain rules on the basis of religious, moral, rational, and historical reflections. Hugo Grotius' work, *De Jure Belli ac Pacis, libri iii.* (1625), offered a systematised body of rules, which recommended themselves so much to the needs and wants of the time that they became the basis of the development following. Without the conviction of the Governments and of public opinion of the civilised States that there ought to be legally binding rules for international conduct, on the one hand, and, on the other hand, without the pressure exercised upon the States by their interests and the necessity for the growth of such rules, the latter would never have grown up. When afterwards, especially in the nineteenth century, it became apparent that customs and usages alone were not sufficient, or not sufficiently clear, new rules were created through law-making treaties being concluded which laid down rules for future international conduct. Thus conventional rules gradually grew up side by side with customary rules.¹

New States which came into existence and were through express or tacit recognition admitted into the Family of Nations thereby consented to the body of rules for international conduct in force at the time of

¹ See the judgment in the case of *The Scotia*, (1871) 81 U.S. 170, where the fact is clearly stated that Inter-

national Law rests on the common consent—express or implied—of the several States.

their admittance. It is therefore not necessary to prove for every single rule of International Law that every single member of the Family of Nations consented to it. No single State can say on its admittance into the Family of Nations that it desires to be subjected to such and such a rule of International Law, and not to others. The admittance includes the duty to submit to all the rules in force, with the sole exception of those which, as, for instance, the rules of the Geneva Convention, are specially stipulated for such States only as have concluded, or later on acceded to, a certain international treaty creating the rules concerned.

On the other hand, no State which is a member of the Family of Nations can at some time or another declare that it will in future no longer submit to a certain recognised rule of the Law of Nations. The body of the rules of this law can be altered by common consent only, not by a unilateral declaration on the part of one State. This applies not only to customary rules, but also to such conventional rules as have been called into existence through a law-making treaty for the purpose of creating a permanent mode of future international conduct without a right of the signatory Powers to give notice of withdrawal. It would, for instance, be a violation of International Law on the part of a signatory Power of the Declaration of Paris of 1856 to declare that it would cease to be a party. But it must be emphasised that this does not apply to such conventional rules as are stipulated by a law-making treaty which expressly reserves the right to the signatory Powers to give notice of withdrawal.

§ 13. Since the Law of Nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively (apart

States the
Subjects
of the
Law of
Nations.

from the League of Nations ¹⁾ are the subjects of International Law. This means that the Law of Nations is a law for the international conduct of States, and not of their citizens. Subjects of the rights and duties arising from the Law of Nations are States solely and exclusively. An individual human being, such as a king or an ambassador for example, is never directly a subject of International Law. Therefore, all rights which might necessarily have to be granted to an individual human being according to the Law of Nations are not international rights, but rights granted by Municipal Law in accordance with a duty imposed upon the State concerned by International Law. Likewise, all duties which might necessarily have to be imposed upon individual human beings according to the Law of Nations are not international duties, but duties imposed by Municipal Law in accordance with a right granted to, or a duty imposed upon, the State concerned by International Law. Thus the privileges of an ambassador are granted to him by the Municipal Law of the State to which he is accredited, but that State has the duty to grant these privileges according to International Law. Thus, further, the duties incumbent upon officials and subjects of neutral States in time of war are imposed upon them by the Municipal Law of their home States, but these States have, according to International Law, the duty of imposing such duties upon their officials and citizens.²

§ 14. Since the Law of Nations is based on the common consent of States as sovereign communities,

¹ The Family of Nations being now organised as the League of Nations, the latter is, of course, the subject of rights as well as duties; and these rights and duties are international and not supernatural.

² The importance of the fact that subjects of the Law of Nations are States exclusively is so great that I consider it necessary to emphasise it again and again throughout this

work. See, for instance, below, §§ 289, 344, 384. It should, however, at once be mentioned that this assertion is even nowadays still sometimes contradicted; see, for instance, Kaufmann, *Die Rechtskraft des internationalen Rechts* (1899), *passim*; Rehm in *Z.V.*, i. (1907), p. 53; and Diena in *R.G.*, xvi. pp. 57-76.

the member-States of the Family of Nations are equal to each other as subjects of International Law. States are by their nature certainly not equal as regards power, extent, constitution, and the like. But as members of the community of nations they are equals, whatever differences between them may otherwise exist. This is a consequence of their sovereignty, and of the fact that the Law of Nations is a law between, not above, the States.¹

Equality
an Inference from
the Basis of Inter-
national
Law.

III

SOURCES OF THE LAW OF NATIONS

Hall, pp. 5-13—Maine, pp. 1-25—Lawrence, §§ 50-55—Phillimore, i. §§ 17-33—Twiss, i. §§ 82-103—Taylor, §§ 30-36—Westlake, i. pp. 14-19—Wheaton, § 15—Halleck, i. pp. 60-68—Hershey, Nos. 11-15—Ullmann, §§ 8-9—Heffter, § 3—Holtzendorff in *Holtzendorff*, i. pp. 79-155—Heilborn, *Grundbegriffe des Völkerrechts* (1912), §§ 6-9—Rivier, i. § 2—Nys, i. pp. 152-173—Bonfils, Nos. 45-63—Despagnet, Nos. 58-63—Pradier-Fodéré, i. Nos. 24-35—Mérignhac, i. pp. 79-113—Martens, i. § 43—Fiore, i. Nos. 224-238—Calvo, i. §§ 27-38—Bergbohm, *Staatsverträge und Gesetze als Quellen des Völkerrechts* (1877)—Jellinek, *Die rechtliche Natur der Staatsverträge* (1880)—Cavaglieri, *La Consuetudine giuridica internazionale* (1907)—Oppenheim in *Z.I.*, xxv. (1914), pp. 1-13—Praag, Nos. 7-15.

§ 15. The different writers on the Law of Nations disagree widely with regard to kinds and numbers of sources of this law. The fact is that the term 'source of law' is made use of in different meanings by the different writers on International Law, as on law in general. It seems to me that most writers confound the conception of 'source' with that of 'cause,' and through this mistake come to a standpoint from which certain factors which influence the growth of International Law appear as sources of rules of the Law of

Source in
contra-
distinction to
Cause.

¹ See below, §§ 115-116, where the legal equality of States in contradistinction to their political inequality is discussed, and where it will also

be shown that not-full sovereign States are not equals of full sovereign States.

Nations. This mistake can be avoided by going back to the meaning of the term 'source' in general. Source means a spring or well, and has to be defined as the rising from the ground of a stream of water. When we see a stream of water and want to know whence it comes, we follow the stream upwards until we come to the spot where it rises naturally from the ground. On that spot, we say, is the source of the stream of water. We know very well that this source is not the cause of the existence of the stream of water. Source signifies only the natural rising of water from a certain spot on the ground, whatever natural causes there may be for that rising. If we apply the conception of source in this meaning to the term 'source of law,' the confusion of source with cause cannot arise. Just as we see streams of water running over the surface of the earth, so we see, as it were, streams of rules running over the area of law. And if we want to know whence these rules come, we have to follow these streams upwards until we come to their beginning. Where we find that such rules rise into existence, there is the source of them. Of course, rules of law do not rise from a spot on the ground as water does; they rise from facts in the historical development of a community. Thus in Great Britain a good many rules of law rise every year from Acts of Parliament. 'Source of law' is therefore the name for an historical fact out of which rules of conduct rise into existence and legal force.

The two
Sources of
Inter-
national
Law.

§ 16. As the basis of the Law of Nations is the common consent of the member-States of the Family of Nations, it is evident that there must exist, and can only exist, as many sources of International Law as there are facts through which such common consent can possibly come into existence. Of such facts there are only two. A State, just as an individual, may give its

consent either directly by an express declaration, or tacitly by conduct which it would not follow in case it did not consent. The sources of International Law are therefore twofold—namely: (1) *express* consent, which is given when States conclude a treaty stipulating certain rules for the future international conduct of the parties; (2) *tacit* consent, implicit consent or consent by conduct, which is given through States having adopted the custom of submitting to certain rules of international conduct. Treaties and custom are, therefore, exclusively the sources of the Law of Nations.

§ 17. Custom is the older and the original source of International Law in particular as well as of law in general. Custom must not be confounded with usage. In everyday life and language both terms are used synonymously, but in the language of the international jurist they have two distinctly different meanings. International jurists speak of a custom when a clear and continuous habit of doing certain actions has grown up under the ægis of the conviction that these actions are, according to International Law, obligatory or right. On the other hand, international jurists speak of a usage when a habit of doing certain actions has grown up without there being the conviction that these actions are, according to International Law, right or obligatory. Thus the term 'custom' is in the language of international jurisprudence a narrower conception than the term 'usage,' as a given course of conduct may be usual without being customary. Certain conduct of States concerning their international relations may therefore be usual without being the outcome of customary¹ International Law.

¹ See Klüber, § 3. It is very deplorable that the distinction between custom and usage in International Law is very frequently not drawn by many publicists. It would seem that Hall occasionally recognises

the distinction, although he names 'usage' what really is 'custom,' and *vice versa*. See, for instance, Hall, § 139, where he says 'this *custom* has since hardened into a definite *usage*.'

Custom in
contra-
distinc-
tion to
Usage.

As usages have a tendency to become custom, the question presents itself, at what time a usage turns into a custom. This question is one of fact, not of theory. All that theory can point out is this: Wherever and as soon as a line of international conduct frequently adopted by States is considered legally obligatory or legally right, the rule, which may be abstracted from such conduct, is a rule of customary International Law.

Treaties
as Source
of Inter-
national
Law.

§ 18. Treaties are the second source of International Law, and a source which has of late become of the greatest importance. As treaties may be concluded for innumerable purposes,¹ it is necessary to emphasise that such treaties only are a source of International Law as either stipulate new rules for future international conduct or confirm, define, or abolish existing customary or conventional rules. Such treaties must be called *law-making treaties*. Since the Family of Nations is not a State-like community, there is no central authority which could make law for it in the way that Parliaments make law by statutes within the States. The only way in which International Law can be made by a deliberate act, in contradistinction to custom, is that the members of the Family of Nations conclude treaties in which certain rules for their future conduct are stipulated. Of course, such law-making treaties create law for the contracting parties solely. Their law is *universal* International Law only when all the members of the Family of Nations are parties to them. Many law-making treaties are concluded by a few States only, so that the law which they create is *particular* International Law. On the other hand, many law-making treaties have been concluded which contain *general* International Law, because the majority of States, including leading Powers, are parties to

¹ See below, § 492.

them. General International Law has a tendency to become universal because such States as hitherto did not consent to it will in future either expressly give their consent or recognise the rules concerned tacitly through custom.¹ But it must be emphasised that, whereas custom is the original source of International Law, treaties are a source the power of which derives from custom. For the fact that treaties can stipulate rules of international conduct at all is based on the customary rule of the Law of Nations, that treaties are binding upon the contracting parties.²

§ 19. Thus custom and treaties are the two exclusive sources of the Law of Nations. When writers on International Law frequently enumerate other sources besides custom and treaties, they confound the term 'source' with that of 'cause' by calling sources of International Law such factors as influence the gradual growth of new rules of International Law without, however, being the historical facts from which these rules receive their legal force. Important factors of this kind are: Opinions of famous writers³ on International Law, decisions of prize courts, arbitral awards,⁴ instructions issued by the different States for the guidance of their diplomatic and other organs, State Papers concerning foreign politics, certain Municipal Laws, decisions of municipal courts.⁵ All these and other factors may influence the growth of International Law either by creating usages which gradually turn into custom, or by inducing the members of the Family of Nations to conclude such treaties as stipulate legal rules for future international conduct.

Factors influencing the Growth of International Law.

A factor of a special kind which also influences the

¹ Law-making treaties of world-wide importance are enumerated below, §§ 556-568c.

² See below, § 493.

³ See Oppenheim in *A.J.*, ii. (1908), pp. 344-348, and Praag, No. 11.

⁴ See Oppenheim in *A.J.*, ii. (1908), pp. 341-344.

⁵ See Oppenheim in *A.J.*, ii. (1908), pp. 336-341, and Praag, No. 10.

growth of International Law is the so-called *Comity* (*Comitas Gentium, Convenance et Courtoisie Internationale, Staatengunst*). In their intercourse with one another, States do observe not only legally binding rules and such rules as have the character of usages, but also rules of politeness, convenience, and goodwill. Such rules of international conduct are not rules of law, but of comity. The Comity of Nations is certainly not a source of International Law, as it is distinctly in contrast to the Law of Nations. But there can be no doubt that many a rule which formerly was a rule of International Comity only is nowadays a rule of International Law. And it is certainly to be expected that this development will go on in future also, and that thereby many a present rule of International Comity will in future become one of International Law.¹

Not to be confounded with the rules of comity are the rules of morality, which ought to apply to the intercourse of States as much as to the intercourse of individuals.

IV

RELATIONS BETWEEN INTERNATIONAL AND MUNICIPAL LAW

Holtzendorff in *Holtzendorff*, i. pp. 49-53, 117-120—Heilborn, *Grundbegriffe des Völkerrechts* (1912), § 17—Nys, i. pp. 194-199—Taylor, § 103—Hershey, No. 10—Holland, *Studies*, pp. 176-200—Kaufmann, *Die Rechtskraft des internationalen Rechts* (1899)—Triepel, *Völkerrecht und Landesrecht* (1899)—Anzilotti, *Il Diritto internazionale nei Giudizi interni* (1905)—Oppenheim, *The Panama Canal Conflict* (1913), pp. 38-44—Picciotto, *The Relation of International Law to the Law of England and the United States* (1915)—Wright, *The Enforcement of International*

¹ The matter is ably discussed in Stoerk, *Völkerrecht und Völker-courtoisie* (1908). See also Heilborn,

Grundbegriffe des Völkerrechts (1912), pp. 107-110, and Praag, No. 24.

Law through Municipal Law in the United States (1916), and in *A.J.*, xi. (1917), pp. 1-21—Praag, Nos. 17-22 and 276-281—Kohler in *Z. V.*, ii. (1908), pp. 209-230—Wilkinson in the *Law Magazine and Review*, xl. (1914-15), pp. 447-463.

§ 20. The Law of Nations and the Municipal Law of the several States are essentially different from each other. They differ, first, as regards their sources. Sources of Municipal Law are custom grown up within the boundaries of the State concerned and statutes enacted by the law-giving authority. Sources of International Law are custom grown up within the Family of Nations and law-making treaties concluded by the members of that family.

Essential
Difference
between
Inter-
national
and Muni-
cipal Law.

The Law of Nations and Municipal Law differ, secondly, regarding the relations they regulate. Municipal Law regulates relations between the individuals under the sway of a State and the relations between this State and those individuals. International Law, on the other hand, regulates relations between the member-States of the Family of Nations.

The Law of Nations and Municipal Law differ, thirdly, with regard to the substance of their law: whereas Municipal Law is a law of a sovereign over individuals subjected to his sway, the Law of Nations is a law not above, but between sovereign States, and therefore a weaker law.¹

§ 21. If the Law of Nations and Municipal Law differ as demonstrated, the Law of Nations can neither as a body nor in parts be *per se* a part of Municipal Law. Just as Municipal Law lacks the power of altering or creating rules of International Law, so the latter lacks absolutely the power of altering or creating rules of Municipal Law. If, according to the Municipal Law of an individual State, the Law of Nations as a body or in parts is considered to be the law of the land, this

Law of
Nations
never *per
se* Muni-
cipal Law.

¹ See above, § 9.

can only be so either by municipal custom or by statute, and then the respective rules of the Law of Nations have by adoption become at the same time rules of Municipal Law. Wherever and whenever such total or partial adoption has not taken place, municipal courts cannot be considered to be bound by International Law, because it has, *per se*, no power over municipal courts.¹ And if it happens that a rule of Municipal Law is in indubitable conflict with a rule of the Law of Nations, municipal courts must apply the former. If, again, a rule of the Law of Nations regulates a fact without conflicting with, but without expressly or tacitly having been adopted by Municipal Law, municipal courts cannot apply such rule of the Law of Nations.

Law of
Nations
and
British
and
Ameri-
can Muni-
cipal Law.

§ 21*a*. It is frequently maintained that the Law of Nations to its whole extent is part of the law of England and of the United States of America; but this assertion is quite untenable if the facts are carefully taken into consideration.

(1) As regards England,² there is no doubt that all such rules of customary International Law as are either universally recognised or have at any rate received the assent of this country, and further all law-making international conventions ratified by this country, are binding upon English courts, unless they be in conflict with English statutory law. For English

¹ This ought to be generally recognised; but, in fact, is not. There are a number of writers (see, for instance, Pillet in *R.G.*, v. (1898), p. 87, note 1, and Kohler in *Z.V.*, ii. (1908), pp. 209 ff.) who consider International Law to be more a super-state than an inter-state law, and who, therefore, consider International Law to be superior to Municipal Law. According to their opinion, municipal courts are bound by rules of International Law even

in cases of conflict between International and Municipal Law.

² See Blackstone, *Commentaries on the Laws of England*, iv. ch. 5; Westlake, *Papers*, pp. 498-518; but chiefly Picciotto, *op. cit.*, and Pyke in the *Law Quarterly Review*, xxxii. (1916), pp. 144-167. See also the case of *The West Rand Central Gold Mining Co. Ltd. v. Rex*, [1905] 2 K.B. 391. For the numerous other cases see Picciotto, *op. cit.*

statutory law is under all circumstances and conditions binding upon English courts, even if in conflict with International Law, although in doubtful cases there is a presumption that no overruling of International Law is intended by an Act of Parliament. In particular, the rules of International Prize Law—whether conventional or customary rules—are binding upon English prize courts, unless they be in conflict with an Act of Parliament. Orders in Council which are not in conformity with International Prize Law are not binding upon English prize courts unless they amount to a mitigation of the Crown rights in favour of the enemy or a neutral, or they order such reprisals as are justified by the circumstances of the case and do not entail upon neutrals a degree of unreasonable inconvenience.¹ However, the jurisdiction of an English prize court does not embrace the whole region covered by International Law, but is confined to taking cognisance of, and adjudicating upon, certain matters (including capture at sea) which in former times were enumerated in the Royal Commission under which the court was constituted, and are now defined both by statute and by the Royal Commission issued at the beginning of a war.²

(2) As regards the United States of America,³ there is no doubt that all such customary International Law

¹ *The Zamora*, [1916] P. 27, and [1916] 2 A.C. 77, 1 B. and C.P.C. 309, and 2 B. and C.P.C. 1; *The Alwina*, 34 Times L.R. 199, 3 B. and C.P.C. 54; *The Stigstad*, [1916] P. 123, and [1919] A.C. 279; *The Leonora*, [1918] P. 182, and [1919] A.C. 974.

² *The Sudmark* (No. 2), (1917) 33 Times L.R. 575, 2 B. and C.P.C. 473.

³ See Taylor, § 103; Scott in *A.J.*, i. (1907), pp. 852-866; Oppenheim, *The Panama Canal Conflict* (1913), pp. 40-42; but principally Picciotto, *op. cit.*, pp. 109-124, and Wright,

op. cit., and in *A.J.*, xi. (1917), pp. 1-21. The principal cases are *The Nereide*, (1815) 9 Cranch 388; *United States v. Smith*, (1820) 5 Wheaton 153; *The Scotia*, (1871) 14 Wallace 170; *The Paquette Habana*, (1899) 175 United States 677. For other cases see Picciotto, *op. cit.*, pp. 111-120. As regards the relation between International Law and the Municipal Law of all the American Republics, see Moore and Wilson in the *Proceedings of the American Society of International Law*, ix. (1916), pp. 11-30.

as is universally recognised, or has at any rate received the consent of the United States, and further all law-making international conventions ratified by the United States, are binding upon American courts, even if in conflict with previous American statutory law; for according to the practice of the United States, customary as well as conventional International Law overrules previous Municipal Law, provided it does not conflict with the Constitution¹ of the United States. On the other hand, American statutory law is binding upon the courts of the United States, even if in conflict with previous customary or conventional International Law; for American statutory law overrules previous International Law, although in doubtful cases there is a presumption that no overruling of International Law is intended by an Act of Congress.

Certain
Rules of
Municipal
Law ne-
cessitated
or inter-
dicted.

§ 22. If municipal courts cannot apply unadopted rules of the Laws of Nations, and must apply even such rules of Municipal Law as conflict with the Law of Nations, it is evident that the several States, in order to fulfil their international obligations, are compelled to possess certain rules, and are prevented from having certain other rules, as part of their Municipal Law. It is not necessary to enumerate all the rules of Municipal Law which a State must possess, and all those rules it is prevented from having. It suffices to give some illustrative examples. Thus, for instance, on the one hand, the Municipal Law of every State is compelled to possess rules granting the necessary privileges to foreign diplomatic envoys, protecting the life and liberty of foreign citizens residing on its territory, threatening punishment for certain acts committed on its territory in violation of a foreign State. On the other hand, the Municipal Law of every State is prevented by the Law of Nations from having rules, for

¹ *In re Dillon*; see Wharton, i. p. 667, and Moore, v. p. 78.

instance, conflicting with the freedom of the high seas, or prohibiting the innocent passage of foreign merchantmen through its maritime belt, or refusing justice to foreign residents with regard to injuries committed on its territory to their lives, liberty, and property by its own citizens. If a State does nevertheless possess such rules of Municipal Law as it is prohibited from having by the Law of Nations, or if it does not possess such municipal rules as it is compelled to have by the Law of Nations, it violates an international legal duty; but its courts ¹ cannot by themselves alter the Municipal Law to meet the requirements of the Law of Nations.

§ 23. However, although municipal courts must apply Municipal Law even if conflicting with the Law of Nations, there is a presumption against the existence of such a conflict. As the Law of Nations is based upon the common consent of the different States, it is improbable that a civilised State would intentionally enact a rule conflicting with the Law of Nations. A part of Municipal Law, which ostensibly seems to conflict with the Law of Nations, must, therefore, if possible, always be so interpreted as essentially not containing such conflict.

§ 24. In case of a gap in the statutes of a civilised State regarding certain rules necessitated by the Law of Nations, such rules ought to be presumed by the courts to have been tacitly adopted by such Municipal Law. It may be taken for granted that a State which is a member of the Family of Nations does not intentionally want its Municipal Law to be deficient in such rules. If, for instance, the Municipal Law of a State does not by a statute grant the necessary privileges to diplomatic envoys, the courts ought to presume that such privileges are tacitly granted.

¹ This became quite apparent in the Moray Firth case (*Mortensen v. Peters*)—see below, § 192—in which

the court had to apply British Municipal Law.

Presumption
against
Conflicts
between
Inter-
national
and Muni-
cipal Law.

Presump-
tion of
Existence
of certain
necessary
Municipal
Rules.

Presump-
tion of the
Existence
of certain
Municipal
Rules in
con-
formity
with
Rights
granted
by the
Law of
Nations.

§ 25. There is no doubt that a State need not make use of all the rights it has by the Law of Nations, and that, consequently, every State can by its laws expressly renounce the whole or partial use of such rights, provided always it is ready to fulfil such duties, if any, as are connected with these rights. However, when no such renunciation has taken place, municipal courts ought, in case the interests of justice demand it, to presume that their sovereign has tacitly consented to make use of such rights. If, for instance, the Municipal Law of a State does not by a statute extend its jurisdiction over its maritime belt, its courts ought to presume that, since by the Law of Nations the jurisdiction of a State does extend over its maritime belt, their sovereign has tacitly consented to that wider range of its jurisdiction.

A remarkable case illustrating this happened in this country in 1876. The German vessel *Franconia*, while passing through the British maritime belt within three miles of Dover, negligently ran into the British vessel *Strathclyde*, and sank her. As a passenger on board the latter was thereby drowned, the commander of the *Franconia*, the German Keyn, was indicted at the Central Criminal Court and found guilty of manslaughter. The Court for Crown Cases Reserved, however, to which the Central Criminal Court referred the question of jurisdiction, held by a majority of one judge that, according to the law of the land, English courts had no jurisdiction over crimes committed in the English maritime belt. Keyn was therefore not punished.¹ To provide for future cases of a like kind, Parliament passed, in 1878, the Territorial Waters Jurisdiction Act.²

¹ *R. v. Keyn*, (1876) 2 Ex. D. 63. See Phillimore, i. § 198b; Maine, pp. 39-45; Stephen, *History of the Criminal Law of England* (1883), vol. ii. pp. 29-42. See also below, § 189, where the controversy is discussed

whether a littoral State has jurisdiction over foreign vessels that merely pass through its maritime belt.

² 41 & 42 Vict. c. 73.

V

DOMINION OF THE LAW OF NATIONS

Lawrence, § 44—Phillimore, i. §§ 27-33—Twiss, i. § 62—Taylor, §§ 60-64—Westlake, i. p. 40—Bluntschli, §§ 1-16—Heffter, § 7—Holtzendorff in *Holtzendorff*, i. pp. 13-18—Nys, i. pp. 121-137—Rivier, i. § 1—Bonfils, Nos. 40-44—Despagnet, Nos. 51-53—Martens, i. § 41—Fiore, *Code*, Nos. 43-48—Ullmann, § 10—Heilborn, *Grundbegriffe des Völkerrechts* (1912), §§ 10-12—Praag, Nos. 4-5—Nippold in *Z.V.*, ii. (1908), pp. 441-443—Cavaglieri in *R.G.*, xviii. (1911), pp. 259-292.

§ 26. Dominion of the Law of Nations is the name given to the area within which International Law is applicable—that is, those States between which International Law finds validity. The range of the dominion of the Law of Nations is controversial, two extreme opinions concerning this dominion being opposed. Some publicists¹ maintain that the dominion of the Law of Nations extends as far as humanity itself, that every State, whether Christian or non-Christian, civilised or uncivilised, is a subject of International Law. On the other hand, several jurists² teach that the dominion of the Law of Nations extends only as far as Christian civilisation, and that Christian States only are subjects of International Law. Neither of these opinions would seem to be in conformity with the facts of the present international life and the basis of the Law of Nations. There is no doubt that the Law of Nations is a product of Christian civilisation. It originally arose between the States of Christendom only, and for hundreds of years was confined to these States. Between Christian and Mohammedan nations a condition of perpetual enmity prevailed in former centuries. And no constant intercourse existed in former times between Christian and Buddhistic States. But from about the

Range of
Dominion
of Inter-
national
Law con-
troversial.

¹ See, for instance, Bluntschli, § 8, and Fiore, *Code*, No. 43.

² See, for instance, Martens, § 41.

beginning of the nineteenth century matters gradually changed. A condition of perpetual enmity between whole groups of nations exists no longer either in theory or in practice. And although there is still a broad and deep gulf between Christian civilisation and others, many interests, which knit Christian States together, knit likewise some non-Christian and Christian States.

Three
Condi-
tions of
Member-
ship of the
Family of
Nations.

§ 27. Thus the membership of the Family of Nations has of late necessarily been increased, and the range of the dominion of the Law of Nations has extended beyond its original limits. This extension has taken place in conformity with the basis of the Law of Nations. As this basis is the common consent of the civilised States, there are three conditions for the admission of new members into the circle of the Family of Nations. A State to be admitted must, first, be a civilised State which is in constant intercourse with members of the Family of Nations. Such State must, secondly, expressly or tacitly consent to be bound for its future international conduct by the rules of International Law. And, thirdly, those States which have hitherto formed the Family of Nations must, expressly or tacitly consent to the reception of the new member.

The last two conditions are so obvious that they need no comment. Regarding the first condition, however, it must be emphasised that not particularly Christian civilisation, but civilisation of such kind only is conditioned as to enable the State concerned and its subjects to understand, and to act in conformity with, the principles of the Law of Nations. These principles cannot be applied to a State which is not able to apply them on its own part to other States. On the other hand, they can well be applied to a State which is able and willing to apply them to other States, provided a constant intercourse has grown up between it and other States. The fact is that the Christian States have been

of late compelled by pressing circumstances to receive several non-Christian States into the community of States which are subjects of International Law.

§ 28. The present range of the dominion of International Law is a product of historical development, within which epochs are distinguishable, marked by successive entrances of various States into the Family of Nations.

Present
Range of
Dominion
of the
Law of
Nations.

(1) The old Christian States of Western Europe are the original members of the Family of Nations, because the Law of Nations grew up gradually between them through custom and treaties. Whenever afterwards a new Christian State made its appearance in Europe, it was received into the charmed circle by the old members of the Family of Nations. It is for this reason that this law was in former times frequently called 'European Law of Nations.' But this name has nowadays historical value only, as it has been changed into 'Law of Nations,' or 'International Law' pure and simple.

(2) The next group of States which entered into the Family of Nations was the body of Christian States which grew up outside Europe. All the American¹ States which arose out of colonies of European States belong to this group. And it must be emphasised that the United States of America have largely contributed to the growth of the rules of International Law. The two Christian Negro Republics of Liberia in West Africa and of Haiti on the island of San Domingo belong to this group.

¹ But it ought not to be maintained that there is—in contradistinction to the European—an American International Law in existence; see, however, Alvarez, *Le Droit international américain* (1910), and again Alvarez in *A.J.*, iii. (1909), pp. 269-353. The arguments of Alvarez are refuted by Sá Vianna in his excellent work, *De la Non-*

Existence d'un Droit international américain (1912). Alvarez in *R. G.*, xx. (1913), pp. 48-52, somewhat modifies his views; but he still considers the existence of an American in contradistinction to a European International Law to be possible. See also Heilborn, *Grundbegriffe des Völkerrechts* (1912), pp. 61-68.

(3) With the reception of Turkey into the Family of Nations International Law ceased to be a law between Christian States solely. This reception took place expressly through Article 7 of the Peace Treaty of Paris of 1856, in which the five Great European Powers of the time, namely, France, Austria, England, Prussia, and Russia, and besides those Sardinia, the nucleus of the future Great Power Italy, expressly '*déclarent la Sublime Porte admise à participer aux avantages du droit public et du concert européens.*' From that time until the outbreak of the World War Turkey was invited to send delegates to every general congress which took place. But her position as a member of the Family of Nations was anomalous, because her civilisation fell short of that of the Western States. It was for that reason that the so-called Capitulations¹ were still in force, and that other anomalies still prevailed. The Treaty of Peace between Turkey and the Allied Powers has not yet been concluded, and it is impossible at present to make any statement as to the position of Turkey within the Family of Nations after the World War.

(4) Another non-Christian member of the Family of Nations is Japan. A generation ago one might have doubted whether Japan was a real and full member of that family, but after the end of the nineteenth century no doubt was any longer justified. Through marvellous efforts, Japan has become not only a modern State, but an influential Power. Since her war with China in 1895, she must be considered one of the Great Powers that lead the Family of Nations, and was numbered among the five principal Allied and Associated Powers in the Treaties of Peace after the World War.

¹ In September 1914, shortly before she became a belligerent, Turkey denounced the Capitulations (see *A.J.*, viii. (1914), p. 873). This

act called forth immediate protests, and the question may be expected to be dealt with by the Treaty of Peace with Turkey.

(5) Before the World War the position of such States as Persia, Siam, China, Abyssinia, and the like, was doubtful. These States were certainly civilised States, and Abyssinia was even a Christian State. However, their civilisation had not yet reached that condition which was necessary to enable their Governments and their population in every respect to understand, and to carry out, the rules of International Law. On the other hand, international intercourse had widely arisen between these States and the States of the so-called Western civilisation. Many treaties had been concluded with them, and there was full diplomatic intercourse between them and the Western States. China, Persia, and Siam had even taken part in the Hague Peace Conferences. All of them were making efforts to educate their populations, to introduce modern institutions, and thereby to raise their civilisation to the level of that of the Western. But as yet they had not accomplished this task, and consequently they were not yet able to be received into the Family of Nations as full members. Although they were, as will be shown below (§ 103), for some parts within the circle of the Family of Nations, they remained for other parts outside. In the World War China and Siam took part on the side of the Allied and Associated Powers, and were represented at the Peace Conference at Paris. At the conclusion of the World War, Persia, Siam, and China became members of the League of Nations.¹ Abyssinia was not invited to accede to the Covenant of the League, and its position would seem to be unchanged.

(6) It must be mentioned that a State of quite a unique character, the former Congo Free State,² was, after the Berlin Conference of 1884-1885, a member of the Family of Nations. But it lost its membership in 1908, when it merged in Belgium by cession.

¹ See below, § 167*b*.

² See below, § 101.

(7) Changes have taken place in the membership of the Family of Nations as a result of the World War. Three new States—Poland, Czecho-Slovakia, and the Hedjaz—have come into being. The former State of Serbia has united with peoples hitherto subject to Austria-Hungary to form the Serb-Croat-Slovene State. The Austro-Hungarian Empire has ceased to exist, and Austria and Hungary have become separate States. It is at present doubtful whether Montenegro will continue to exist as an independent State; the future position of Albania is also unsettled.¹

(8) As a result of the dissolution of the Russian Empire further changes, still incomplete, are taking place in the Family of Nations. Finland has secured recognition as an independent State. Towards the other States which have arisen amid the ruins of Russia—Esthonia, Lithuania, and Latvia on the Baltic, and Georgia, Azerbaijan, and the Erivan Republic of Armenia in Asia Minor—the Great Powers have so far adopted a non-committal and provisional attitude. They have recognised their Governments as *de facto* Governments of autonomous territories (see §§ 71-75), but have so far declined to recognise them as independent States.¹ The vexed Russian question is still undecided, and the leading Powers have refused to have diplomatic relations with the present Russian Government.¹

Treat-
ment of
States
outside
the
Family of
Nations.

§ 29. The Law of Nations, as a law between States based on the common consent of the members of the Family of Nations, naturally does not contain any rules concerning the intercourse with and treatment of such States as are outside that circle. That this intercourse and treatment ought to be regulated by the principles of Christian morality is obvious. But actually a practice frequently prevails which is not only contrary to Christian morality, but arbitrary and barbarous. Be

¹ This was the situation in May 1920, when this volume went to press.

that as it may, it is discretion, and not International Law, according to which the members of the Family of Nations deal with such States as still remain outside that family. But the United States of America apply, as far as possible, the rules of International Law to their relations with the Red Indians.

VI

CODIFICATION OF THE LAW OF NATIONS

Holtzendorff in *Holtzendorff*, i. pp. 136-151—Ullmann, § 11—Despagnet, Nos. 67-68—Bonfils, Nos. 1713-1727—Mérignhac, i. pp. 26-28—Nys, i. pp. 174-193—Rivier, i. § 2—Fiore, i. Nos. 124-127—Martens, i. § 44—Holland, *Studies*, pp. 79-95—Bergbohm, *Staatsverträge und Gesetze als Quellen des Völkerrechts* (1877), pp. 44-77—Bulmerincq, *Praxis, Theorie und Codification des Völkerrechts* (1874), pp. 167-192—Heilborn, *Grundbegriffe des Völkerrechts* (1912), § 16—Alvarez, *La Codification du Droit international* (1912), and in *R.G.*, xx. (1913), pp. 24-52, 725-747—Cavaloanti in *R.G.*, xxi. (1914), pp. 183-204—Raszkowski in *R.I.*, xxi. (1889), pp. 521-531—*Proceedings of the American Society of International Law*, iv. (1910), pp. 208-227; v. (1911), pp. 256-337; x. (1916), pp. 149-167—Nys in *A.J.*, v. (1911), pp. 871-900.

§ 30. The lack of precision which is natural to a large number of the rules of the Law of Nations on account of its slow and gradual growth has created a movement for its codification. The idea of a codification of the Law of Nations in its totality arose at the end of the eighteenth century. It was Bentham who first suggested such a codification. He did not, however, propose codification of the existing positive Law of Nations, but thought of a utopian International Law which could be the basis of an everlasting peace between the civilised States.¹

Another utopian project is due to the French Convention, which resolved in 1792 to create a Declaration

¹ See Bentham's Works, ed. Bowring, viii. p. 537; Nys in the *Law Quarterly Review*, xi. (1885), pp. 226-231.

Movement in favour of Codification.

of the Rights of Nations as a pendant to the Declaration of the Rights of Mankind of 1789. For this purpose the Abbé Grégoire was charged with the drafting of such a declaration. In 1795 Abbé Grégoire produced a draft of twenty-one articles, which, however, was rejected by the Convention, and the matter dropped.¹

It was not until 1861 that a real attempt was made to show the possibility of a codification. This was done by an Austrian jurist, Alfons von Domin-Petruschévecz, who published in that year at Leipzig a *Précis d'un Code de Droit international*.

In 1863 Professor Francis Lieber, of the Columbia College, New York, drafted the Laws of War in a body of rules which the United States published during the Civil War for the guidance of her army.²

In 1868 Bluntschli, the celebrated Swiss interpreter of the Law of Nations, published *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt*. This draft code has been translated into the French, Greek, Spanish, and Russian languages, and the Chinese Government produced an official Chinese translation as a guide for Chinese officials.

In 1872 the great Italian politician and jurist Mancini raised his voice in favour of codification of the Law of Nations in his able essay, *Vocazione del nostro Secolo per la Riforma e Codificazione del Diritto delle Genti*.

Likewise in 1872 appeared at New York David Dudley Field's *Draft Outlines of an International Code*.

In 1873 the Institute of International Law was founded at Ghent in Belgium.³ This association of

¹ See Rivier, i. p. 40, where the full text of these twenty-one articles is given. They do not contain a real code, but certain principles only.

² See below, vol. ii. § 68 (4).

³ In 1912 the American Institute of International Law was founded at Washington as a pendant of the Institute of International Law.

jurists of all nations meets periodically, and has produced a number of drafts concerning various parts of International Law, and, in particular, a Draft Code of the Law of War on Land (1880), and a Draft Code of Maritime Warfare (1913).

Likewise in 1873 was founded the Association for the Reform and Codification of the Law of Nations, which also meets periodically and which styles itself now the International Law Association.

In 1874 the Emperor Alexander II. of Russia took the initiative in assembling an international conference at Brussels for the purpose of discussing a draft code of the Law of Nations concerning land warfare. At this conference jurists, diplomatists, and military men were united as delegates of the invited States, and they agreed upon a body of sixty articles which goes under the name of the Declaration of Brussels. But the Powers have never ratified these articles.

In 1880 the Institute of International Law published its *Manuel des Lois de la Guerre sur Terre*.

In 1887 Leone Levi published his *International Law with Materials for a Code of International Law*.

In 1890 the Italian jurist Fiore published his *Il Diritto internazionale codificato e la sua Sanzione giuridica*, of which a fifth edition appeared in 1915. A French translation of the fourth edition appeared in 1911, and an English translation of the fifth edition appeared in 1916.

In 1906 E. Duplessix published his *La Loi des Nations. Projet d'Institution d'une Autorité nationale, législative, administrative, judiciaire. Projet de Code de Droit international public*.

In 1906 the Third Pan-American Conference agreed to establish an International Commission of Jurists for the purpose of preparing draft codes of Public as well as Private International Law.¹

¹ See *A.J.*, vi. (1912), pp. 931-935.

In 1911 Jerome Internoscia published his *New Code of International Law* in English, French, and Italian.

In 1911 Eptacio Pessoa published his *Projecto de Codigo de Direito internacional publico*.¹

In 1913 the Institute of International Law published its *Manuel de la Guerre maritime*.

Work of
the First
Hague
Peace
Confer-
ence.

§ 31. At the end of the nineteenth century, in 1899, the so-called Peace Conference at the Hague, convened on the personal initiative of the Emperor Nicholas II. of Russia, showed the possibility that parts of the Law of Nations might well be codified. Apart from three declarations of minor value, and the convention concerning the adaptation of the Geneva Convention to naval warfare, this conference succeeded in producing two important conventions which may well be called codes—namely, first, the ‘Convention for the Pacific Settlement of International Disputes,’ and, secondly, the ‘Convention with respect to the Laws and Customs of War on Land.’ The first-named convention is of great practical importance, as the Permanent Court of Arbitration has in a number of cases successfully given its award. Nor can the great practical value of the second-named convention be denied. Although the latter contains, even in the amended form given to it by the second Hague Peace Conference of 1907, many gaps, which must be filled by the customary Law of Nations, and although it is not a masterpiece of codification, it represents a model, the very existence of which teaches that codification of parts of the Law of Nations is practicable, provided the Powers are inclined to come to an understanding. The first Hague Peace Conference therefore made an epoch in the history of International Law.

§ 32. Shortly after the Hague Peace Conference of 1899, the United States of America took a step with

¹ See Alvarez, *La Codification du Droit international*, p. 276 n.

regard to sea warfare similar to that taken by her in 1863 with regard to land warfare. She published on June 27, 1900, a body of rules for the use of her navy under the title, *The Laws and Usages of War at Sea*—the so-called *United States Naval War Code*—which was drafted by Captain Charles H. Stockton, of the United States Navy.

Work of
the
Second
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London.

Although, on February 4, 1904, this code was by authority of the President of the United States withdrawn, it provided the starting-point of a movement for codification of maritime International Law. No complete Naval War Code agreed upon by the Powers has as yet made its appearance, but the second Hague Peace Conference of 1907 produced not less than thirteen conventions, some of which are codifications of parts of maritime law. Three of the thirteen conventions, namely, that for the pacific settlement of international disputes, that concerning the laws and customs of war on land, and that concerning the adaptation of the principles of the Geneva Convention to maritime war, take the place of three corresponding conventions of the first Hague Peace Conference. But the other ten conventions were entirely new, and concern : the limitation of the employment of force for the recovery of contract debts, the opening of hostilities, the rights and duties of neutral Powers and persons in war on land, the status of enemy merchant ships at the outbreak of hostilities, the conversion of merchant ships into war ships, the laying of automatic submarine contact mines, bombardments by naval forces in time of war, restrictions on the exercise of the right of capture in maritime war, the establishment of an International Prize Court, and the rights and duties of neutral Powers in maritime war.

To make the establishment of the proposed International Prize Court possible, a Naval Conference met

in London in November 1908, sat till February 1909, and produced the Declaration of London. Its nine chapters deal with: blockade, contraband, unneutral service, destruction of neutral prizes, transfer to a neutral flag, enemy character, convoy, resistance to search, compensation. The Declaration of London has, however, not been ratified, and, in consequence, the Hague Convention concerning the establishment of an International Prize Court also remains unratified.

Value of
Codifica-
tion of
Inter-
national
Law con-
tested.

§ 33. In spite of the movement in favour of codification of the Law of Nations, there are many eminent jurists who oppose such codification. They argue that codification would never be possible on account of differences of languages and of technical juridical terms. They assert that codification would cut off the organic growth and future development of International Law. They postulate the existence of a permanent international court with power of executing its verdicts as an indispensable condition, since without such a court no uniform interpretation of controversial parts of a code could be possible. Lastly, they maintain that the Law of Nations is not yet, and will not be for a long time to come, ripe for codification. Those jurists, on the other hand, who are in favour of codification argue that the customary Law of Nations to a great extent lacks precision and certainty, that writers on International Law differ in many points regarding its rules, and that, consequently, there is no broad and certain basis for the practice of the States to stand upon.

Merits of
Codifica-
tion in
general.

§ 34. I am decidedly not a blind and enthusiastic admirer of codification in general. It cannot be maintained that codification is everywhere, at all times, and under all circumstances opportune. Codification certainly interferes with the so-called organic growth of the law through usage into custom. It is true that a law, once codified, cannot so easily adapt itself to

the individual merits of particular cases which come under it. It is further a fact, which cannot be denied, that together with codification there frequently enters into courts of justice, and into the area of juridical literature, a hair-splitting tendency, and an interpretation of the law, which often clings more to the letter and the word of the law than to its spirit and its principles. And it is not at all a fact that codification does away with controversies altogether. Codification certainly clears up many questions of law which have been hitherto debatable, but it creates at the same time new controversies. And, lastly, all jurists know very well that the art of legislation is still in its infancy and not at all highly developed. The hands of legislators are very often clumsy, and legislation often does more harm than good. Yet, on the other hand, the fact must be recognised that history has given its verdict in favour of codification. There is no civilised State in existence whose Municipal Law is not to a greater or lesser extent codified. The growth of the law through custom goes on very slowly and gradually, very often too slowly to be able to meet the demands of the interests at stake. New interests and new inventions very often spring up with which customary law cannot deal. Circumstances and conditions frequently change so suddenly that the ends of justice are not met by the existing customary law of a State. Thus, legislation, which is, of course, always partial codification, becomes a necessity, in the face of which all hesitation and scruple must vanish. Whatever may be the disadvantages of codification, there comes a time in the development of every civilised State when it can no longer be avoided. And great are the advantages of codification, especially of a codification that embraces a large part of the law. Many controversies are done away with. The science of law receives a fresh stimulus.

A more uniform spirit enters into the law of the country. New conditions and circumstances of life become legally recognised. Mortifying principles and branches are cut off with one stroke. A great deal of fresh and healthy blood is brought into the arteries of the body of the law in its totality. If codification is carefully planned and prepared, if it is imbued with true and healthy conservatism, many disadvantages can be avoided. And interpretation on the part of good judges can deal with many a fault that codification has made. If the worst comes to the worst, there is always a Parliament or other law-giving authority of the land to mend by further legislation the faults of previous codification.

Merits of
Codifica-
tion of
Inter-
national
Law.

§ 35. But do these arguments in favour of codification in general also apply to codification of the Law of Nations? I have no doubt that they do more or less. If some of these arguments have no force in view of the special circumstances of the existence of International Law and of the peculiarities of the Family of Nations, there are other arguments which take their place.

When opponents maintain that codification would never be practicable on account of differences of language and of technical juridical terms, I answer that this difficulty is only as great an obstacle in the way of codification as it is in the way of contracting international treaties. The fact that such treaties are concluded every day shows that difficulties which arise out of differences of language and of technical juridical terms are not at all insuperable.

Of more weight than this is the next argument of opponents, that codification of the Law of Nations would cut off its organic growth and future development. It cannot be denied that codification always interferes with the growth of customary law, although

the assertion is not justified that codification *cuts off* such growth. But this disadvantage can be met by periodical revisions of the code, and by its gradual enlargement and improvement through enactment of additional and amending rules according to the wants and needs of the days to come.

When opponents postulate an international court with power of executing its verdicts as an indispensable condition of codification, I answer that the non-existence of such a court is quite as much (or as little) an argument against codification as it is against the very existence of International Law. If there is a Law of Nations in existence in spite of the non-existence of an international court to guarantee its realisation, I cannot see why the non-existence of such a court should be an obstacle to codifying the very same Law of Nations. It may indeed be maintained that codification is all the more necessary as such an international court does not exist. For codification of the Law of Nations and the solemn recognition of a code by a universal law-making international treaty would give more precision, certainty, and weight to the rules of the Law of Nations than they have now in their unwritten condition. And a uniform interpretation of a code is now, since the first Hague Peace Conference instituted a Permanent Court of Arbitration, and since the Covenant of the League of Nations contemplates the establishment of a Permanent International Court of Justice, much more realisable than in former times, although these courts will never have the power of executing their verdicts.

But is the Law of Nations ripe for codification? I readily admit that there are certain parts of that law which would offer the greatest difficulty, and which therefore had better remain untouched for the present. But there are other parts, and I think that they con-

stitute the greater portion of the Law of Nations, which are certainly ripe for codification. There can be no doubt that, whatever can be said against codification of the whole of the Law of Nations, partial codification is possible and comparatively easy. The work done by the Institute of International Law, and published in the *Annuaire de l'Institut de Droit international*, gives evidence of it. And the number and importance of the law-making treaties produced by the Hague Peace Conferences and the Naval Conference of London, 1908-1909 (though the latter have not been ratified), should leave no doubt as to the feasibility of such partial codification.

How
Codifi-
cation
could be
realised.

§ 36. However, although possible, codification could hardly be realised at once. The difficulties, though not insuperable, are so great that it would take the work of perhaps a generation of able jurists to prepare draft codes for those parts of International Law which may be considered ripe for codification. The only way in which such draft codes could be prepared consists in the appointment on the part of the Powers of an international committee composed of a sufficient number of able jurists, whose task would be the preparation of the drafts. Public opinion of the whole civilised world would, I am sure, watch the work of these men with the greatest interest, and the Parliaments of the civilised States would gladly vote the comparatively small sums of money necessary for the costs of the work. But in proposing codification it is necessary to emphasise that it does not necessarily involve a reconstruction of the present international order and a recasting of the whole system of International Law as it at present stands. Naturally, a codification would in many points mean not only an addition to the rules at present recognised, but also the repeal, alteration, and reconstruction of some of these rules. Yet, how-

ever this may be, I do not believe that a codification ought to be, or could be undertaken which would revolutionise the present international order and put the whole system of International Law on a new basis. The codification which I have in view is one that would embody the existing rules of International Law together with such modifications and additions as are necessitated by the conditions of the age and the very fact of codification being taken in hand. If International Law, as at present recognised, is once codified, nothing prevents reformers from making proposals which could be realised by successive codifications.

CHAPTER II

DEVELOPMENT AND SCIENCE OF THE LAW OF NATIONS

I

DEVELOPMENT OF THE LAW OF NATIONS BEFORE GROTIUS

Lawrence, §§ 13-22—Manning, pp. 8-21—Halleck, i. pp. 1-11—Walker, *History*, i. pp. 30-137—Taylor, §§ 6-29—Hershey, Nos. 16-53—Ullmann, §§ 12-14—Holtzendorff in *Holtzendorff*, i. pp. 159-386—Nys, i. pp. 1-22—Martens, i. §§ 8-20—Fiore, i. Nos. 3-31—Calvo, i. pp. 1-32—Bonfils, Nos. 71-86—Despagnet, Nos. 1-19—Mérignhac, i. pp. 38-43—Laurent, *Histoire du Droit des Gens*, etc., 14 vols. (2nd ed. 1861-1868)—Ward, *Enquiry into the Foundation and History of the Law of Nations*, 2 vols. (1795)—Osenbrüggen, *De Jure Belli et Pacis Romanorum* (1836)—Müller-Jochmus, *Geschichte des Völkerrechts im Alterthum* (1848)—Hosack, *Rise and Growth of the Law of Nations* (1882), pp. 1-226—Nys, *Le Droit de la Guerre et les Précurseurs de Grotius* (1882), and *Les Origines du Droit international* (1894)—Hill, *History of Diplomacy in the International Development of Europe*, vol. i. (1905), and vol. ii. (1906)—Cybichowski, *Das antike Völkerrecht* (1907)—Phillipson, *The International Law and Custom of Ancient Greece and Rome*, 2 vols. (1910)—Strupp, *Urkunden zur Geschichte des Völkerrechts*, 2 vols. (1911)—Raeder, *L'Arbitrage international chez les Hellènes* (1912)—Conner, *The Development of Belligerent Occupation* (1912)—Tod, *International Arbitration amongst the Greeks* (1913)—Hershey in *A.J.*, v. (1911), pp. 901-933—Audinet in *R.G.*, xxi. (1914), pp. 29-63.

No Law of
Nations in
antiquity.

§ 37. International Law as a law between sovereign and equal States based on the common consent of these States is a product of modern Christian civilisation, and may be said to be about four hundred years old. However, the roots of this law go very far back into history. Such roots are to be found in the rules and usages which were observed by the different nations of antiquity with regard to their external relations.

But it is well known that the conception of a Family of Nations did not arise in the mental horizon of the ancient world. Each nation had its own religion and gods, its own language, law, and morality. International interests of sufficient vigour to wind a band around all the civilised States, bring them nearer to each other, and knit them together into a community of nations, did not spring up in antiquity. On the other hand, however, no nation could avoid coming into contact with other nations. War was waged and peace concluded. Treaties were agreed upon. Occasionally ambassadors were sent and received. International arbitration was resorted to. International trade sprang up. Political partisans whose cause was lost often fled their country and took refuge in another. And, just as in our days, criminals often fled their country for the purpose of escaping punishment.

Such more or less frequent and constant contact of different nations with one another could not exist without giving rise to certain fairly congruent rules and usages to be observed with regard to external relations. These rules and usages were considered under the protection of the gods ; their violation called for religious expiation. It will be of interest to throw a glance at the respective rules and usages of the Jews, Greeks, and Romans.

§ 38. Although they were monotheists and the stan- The Jews.
dard of their ethics was consequently much higher than that of their heathen neighbours, the Jews did not in fact raise the standard of the international relations of their time except so far as they afforded foreigners living on Jewish territory equality before the law. Proud of their monotheism and despising all other nations on account of their polytheism, they found it totally impossible to recognise other nations as equals. If we compare the different parts of the Bible con-

cerning the relations of the Jews with other nations, we are struck by the fact that the Jews were sworn enemies of some foreign nations, as the Amalekites, for example, with whom they declined to have any relations whatever in peace. When they went to war with those nations, their practice was extremely cruel. They killed not only the warriors on the battle-field, but also the aged, the women, and the children in their homes. Read, for example, the short description of the war of the Jews against the Amalekites in 1 Samuel xv., where we are told that Samuel instructed King Saul as follows : (v. 3) ' Now go and smite Amalek, and utterly destroy all that they have, and spare them not ; but slay both man and woman, infant and suckling, ox and sheep, camel and ass.' King Saul obeyed the injunction, save that he spared the life of Agag, the Amalekite king, and some of the finest animals. Then we are told that the prophet Samuel rebuked Saul and ' hewed Agag in pieces ' with his own hand. Or again, in 2 Samuel xii. 31, we find that King David, ' the man after God's own heart,' after the conquest of the town of Rabbah, belonging to the Ammonites, ' brought forth the people that were therein, and put them under saws, and under harrows of iron, and under axes of iron, and made them pass through the brick-kiln. . . . '

With those nations, however, of which they were not sworn enemies the Jews used to have international relations. Ambassadors were considered sacrosanct, and treaties were faithfully observed. And when they went to war with those nations, their practice was in no way exceptionally cruel, if looked upon from the standpoint of their time and surroundings. Thus we find in Deuteronomy xx. 10-14 the following rules :—

(v. 10). ' When thou comest nigh unto a city to fight against it, then proclaim peace unto it.

(v. 11) 'And it shall be, if it make thee answer of peace, and open unto thee, then it shall be, that all the people that is found therein shall be tributaries unto thee, and they shall serve thee.

(v. 12) 'And if it will make no peace with thee, but will make war against thee, then thou shalt besiege it:

(v. 13) 'And when the Lord thy God hath delivered it into thine hands, thou shalt smite every male thereof with the edge of the sword:

(v. 14) 'But the women, and the little ones, and the cattle, and all that is in the city, even all the spoil thereof, shalt thou take unto thyself; and thou shalt eat the spoil of thine enemies, which the Lord thy God hath given thee.'

Comparatively mild, like these rules for warfare, were the Jewish rules regarding their foreign slaves. Such slaves were not without legal protection. The master who killed a slave was punished (Exodus xxi. 20); if the master struck his slave so severely that he lost an eye or a tooth, the slave became a free man (Exodus xxi. 26 and 27). The Jews, further, allowed foreigners to live among them under the full protection of their laws. 'Love . . . the stranger, for ye were strangers in the land of Egypt,' says Deuteronomy x. 19, and in Leviticus xxiv. 22 there is the command: 'Ye shall have one manner of law, as well for the stranger, as for one of your own country.'

Of the greatest importance, however, for the International Law of the future, are the Messianic ideals and hopes of the Jews, as these Messianic ideals and hopes are not national only, but fully *international*. The following are the beautiful words in which the prophet Isaiah (ii. 2-4) foretells the state of mankind when the Messiah shall have appeared:

(v. 2) 'And it shall come to pass in the last days, that the mountain of the Lord's house shall be estab-

lished in the top of the mountains, and shall be exalted above the hills ; and all nations shall flow unto it.

(v. 3) ‘ And many people shall go and say, Come ye, and let us go up to the mountain of the Lord, to the house of the God of Jacob ; and he will teach us of his ways, and we will walk in his paths ; for out of Zion shall go forth the law, and the word of the Lord from Jerusalem.

(v. 4) ‘ And he shall judge among the nations, and shall rebuke many people : and they shall beat their swords into plowshares, and their spears into pruning-hooks : nation shall not lift up sword against nation, neither shall they learn war any more.’

Thus we see that the Jews, at least at the time of Isaiah, had a foreboding and presentiment of a future when all the nations of the world should be united in peace. And the Jews have given this ideal to the Christian world. It is the same ideal which has in bygone times inspired all those eminent men who have laboured to build up an International Law. And it is again the same ideal which nowadays inspires all lovers of international peace. Although the Jewish State and the Jews as a nation have practically done nothing to realise that ideal, yet it sprang up among them and has never disappeared.

The
Greeks.

§ 39. Totally different from this Jewish contribution to a future International Law is that of the Greeks. The broad and deep gulf between their civilisation and that of their neighbours necessarily made them look down upon those neighbours as barbarians, and thus prevented them from raising the standard of their relations with neighbouring nations above the average level of antiquity. But the Greeks before the Macedonian conquest were never united into one powerful national State. They lived in numerous more or less small city States, which were totally independent of

one another. It is this very fact which, as time went on, called into existence a kind of International Law between these independent States. They could never forget that their inhabitants were of the same race. The same blood, the same religion, and the same civilisation of their citizens united these independent and—as we should say nowadays—sovereign States into a community of States which in time of peace and war held themselves bound to observe certain rules as regards the relations between one another. The consequence was that international arbitration¹ was frequently resorted to, and that the practice of the Greeks in their wars among themselves was a very mild one. It was a rule that war should never be commenced without a declaration of war. Heralds were inviolable. Warriors who died on the battlefield were entitled to burial. If a city was captured, the lives of all those who took refuge in a temple had to be spared. War prisoners could be exchanged or ransomed; their lot was, at the utmost, slavery. Certain places, as, for example, the temple of the god Apollo at Delphi, were permanently inviolable. Even certain persons in the armies of the belligerents were considered inviolable, as, for instance, the priests, who carried the holy fire, and the seers.

Thus the Greeks left to history the example that independent and sovereign States can live, and are in reality compelled to live, in a community which provides a law for the international relations of the member-States, provided that there exist some common interests and aims which bind these States together. It is very often maintained that this kind of International Law of the Greek States could in no way be compared with our modern International Law, as the Greeks did not consider their international rules as legally, but as religiously binding only. We must, however, not

¹ See Raeder, *L'Arbitrage international chez les Hellènes* (1912).

forget that the Greeks never made the same distinction between law, religion, and morality which the modern world makes. The fact itself remains unshaken that the Greek States set an example to the future that independent States can live in a community in which their international relations are governed by certain rules and customs based on the common consent of the members of that community.

The
Romans.

§ 40. Totally different again from the Greek contribution to a future International Law is that of the Romans. As far back as their history goes, the Romans had a special set of twenty priests, the so-called *fetiales*, for the management of functions regarding their relations with foreign nations. In fulfilling their functions the *fetiales* did not apply a purely secular, but a divine and holy law, a *jus sacrale*, the so-called *jus fetiale*. The *fetiales* were employed when war was declared or peace was made, when treaties of friendship or of alliance were concluded, when the Romans had an international claim before a foreign State, or *vice versa*.

According to Roman Law the relations of the Romans with a foreign State depended upon the fact whether or not there existed a treaty of friendship between Rome and that State. In case no such treaty was in existence, persons or goods coming from the foreign land into the land of the Romans, and likewise persons and goods going from the land of the Romans into the foreign land, enjoyed no legal protection whatever. Such persons could be made slaves, and such goods could be seized, and became the property of the captor. Should such an enslaved person ever come back to his country, he was at once considered a free man again according to the so-called *jus postliminii*. An exception was made as regards ambassadors. They were always considered inviolable, and whoever violated

them was handed over to the home State of those ambassadors to be punished according to discretion.

Different were the relations when a treaty of friendship existed. Persons and goods coming from one country into the other stood then under legal protection. So many foreigners came in the process of time to Rome that a whole system of law sprang up regarding these foreigners and their relations with Roman citizens, the so-called *jus gentium* in contradistinction to the *jus civile*. And a special magistrate, the *praetor peregrinus*, was nominated for the administration of that law. Of such treaties with foreign nations there were three different kinds, namely, of *friendship* (*amicitia*), of *hospitality* (*hospitium*), or of *alliance* (*foedus*). I do not propose to go into details about them. It suffices to remark that, although the treaties were concluded without any such provision, notice of termination could be given. Very often these treaties used to contain a provision according to which future controversies could be settled by arbitration of the so-called *recuperatores*.

Very precise legal rules existed as regards war and peace. Roman law considered war a legal institution. There were four different just reasons for war, namely : (1) violation of the Roman dominion ; (2) violation of ambassadors ; (3) violation of treaties ; (4) support given during war to an opponent by a hitherto friendly State. But even in such cases war was only justified if satisfaction was not given by the foreign State. Four *fetiales* used to be sent as ambassadors to the foreign State from which satisfaction was asked. If such satisfaction was refused, war was formally declared by one of the *fetiales* throwing a lance from the Roman frontier into the foreign land. For warfare itself no legal rules existed, but discretion only, and there are examples enough of great cruelty on the part of the

Romans. Legal rules existed, however, for the end of war. War could be ended, first, through a treaty of peace, which was then always a treaty of friendship. War could, secondly, be ended by surrender (*deditio*). Such surrender spared the enemy their lives and property. War could, thirdly and lastly, be ended through conquest of the enemy's country (*occupatio*). It was in this case that the Romans could act according to discretion with the lives and the property of the enemy.

From this sketch of their rules concerning external relations, it becomes apparent that the Romans gave to the future the example of a State with *legal* rules for its foreign relations. As the legal people *par excellence*, the Romans could not leave their international relations without legal treatment. And though this legal treatment can in no way be compared to modern International Law, yet it constitutes a contribution to the Law of Nations of the future, in so far as its example furnished many arguments to those to whose efforts we owe the very existence of our modern Law of Nations.

No Need
for a Law
of Nations
during the
Middle
Ages.

§ 41. The Roman Empire gradually absorbed nearly the whole civilised ancient world, so far as it was known to the Romans. They hardly knew of any independent civilised States outside the borders of their Empire. There was, therefore, neither room nor need for an International Law as long as this Empire existed. It is true that at the borders of this World Empire there were always wars, but these wars gave opportunity for the practice of a few rules and usages only. And matters did not change when under Constantine the Great (306-337) the Christian faith became the religion of the Empire and Byzantium its capital instead of Rome, and, further, when in 395 the Roman Empire was divided into the Eastern and the Western Empires. This Western Empire disappeared in 476, when Romulus

Augustulus, the last emperor, was deposed by Odoacer, the leader of the Germanic soldiers, who made himself ruler in Italy. The land of the extinct Western Roman Empire came into the hands of different peoples, chiefly of Germanic extraction. In Gallia the kingdom of the Franks springs up in 486 under Chlodovech the Merovingian. In Italy the kingdom of the Ostrogoths under Theoderic the Great, who defeated Odoacer, rises in 493. In Spain the kingdom of the Visigoths appears in 456. The Vandals had, as early as in 429, erected a kingdom in Africa, with Carthage as its capital. The Saxons had already gained a footing in Britannia in 449.

All these peoples were barbarians in the strict sense of the term. Although they had adopted Christianity, it took hundreds of years to raise them to the standard of a more advanced civilisation. And, likewise, hundreds of years passed before different nations came to light out of the amalgamation of the various peoples that had conquered the old Roman Empire with the residuum of the population of that Empire. It was in the eighth century that matters became more settled. Charlemagne built up his vast Frankish Empire, and was, in 800, crowned Roman Emperor by Pope Leo III. Again the whole world seemed to be one empire, headed by the Emperor as its temporal, and by the Pope as its spiritual master, and for an International Law there was therefore no room and no need. But the Frankish Empire did not last long. According to the Treaty of Verdun, it was, in 843, divided into three parts, and with that division the process of development set in, which led gradually to the rise of the several States of Europe.

In theory the Emperor of the Germans remained for hundreds of years to come the master of the world; but in practice he was not even master at home, as the

German Princes, step by step, succeeded in establishing their independence. And although, theoretically, the world was well looked after by the Emperor as its temporal and the Pope as its spiritual head, there were constantly treachery, quarrelling, and fighting going on. War practice was the most cruel possible. It is true that the Pope and the Bishops succeeded sometimes in mitigating such practice, but as a rule there was no influence of the Christian teaching visible.

The
Fifteenth
and Six-
teenth
Centuries.

§ 42. The necessity for a Law of Nations did not arise until a multitude of States absolutely independent of one another had successfully established themselves. That process of development, starting from the Treaty of Verdun of 843, reached its climax with the reign of Frederic III., Emperor of the Germans from 1440 to 1493. He was the last of the Emperors crowned in Rome by the hands of the Popes. At that time Europe was, in fact, divided up into a great number of independent States, and thenceforth a law was needed to deal with the international relations of these sovereign States. Seven factors of importance prepared the ground for the growth of principles of a future International Law.

(1) There were, first, the Civilians and the Canonists. Roman Law was, in the beginning of the twelfth century, brought back to the West through Irnerius, who taught this law at Bologna. He and the other *glossatores* and *post-glossatores* considered Roman Law the *ratio scripta*, the law *par excellence*. These Civilians maintained that Roman Law was the law of the civilised world *ipso facto* through the Emperors of the Germans being the successors of the Emperors of Rome. Their commentaries to the *Corpus Juris Civilis* touch upon many questions of the future International Law, which they discuss from the basis of Roman Law.

The Canonists, on the other hand, whose influence was unshaken till the time of the Reformation, treated

from a moral and ecclesiastical point of view many questions of the future International Law concerning war.¹

(2) There were, secondly, collections of maritime law of great importance which made their appearance in connection with international trade. From the eighth century the world trade, which had totally disappeared in consequence of the downfall of the Roman Empire and the destruction of the old civilisation during the period of the Migration of the Peoples, began slowly to develop again. The sea trade specially flourished, and fostered the growth of rules and customs of maritime law, which were collected into codes, and gained some kind of international recognition. The more important of these collections are the following: The *Consolato del Mare*, a private collection made at Barcelona in Spain in the middle of the fourteenth century; ² the *Laws of Oléron*, a collection, made in the twelfth century, of decisions given by the maritime court of Oléron in France; the *Rhodian Laws*, a very old collection of maritime laws which probably was put together between the seventh and the ninth centuries; ³ the *Tabula Amalfitana*, the maritime laws of the town of Amalfi in Italy, which date at latest from the tenth century; the *Leges Wisbuenses*, a collection of maritime laws of Wisby on the island of Gothland, in Sweden, dating from the fourteenth century.

The growth of international trade caused also the rise of the controversy regarding the freedom of the high seas (see below, § 248), which indirectly influenced the growth of an International Law (see below, §§ 248-250).

(3) A third factor was the numerous leagues of

¹ See Holland, *Studies*, pp. 40-58; Walker, *History*, i. pp. 204-212.

les anciens Jurisconsultes espagnols (1914), pp. 125-138.

³ See Ashburner, *The Rhodian Sea Law* (1909), Introduction, p. cxii.

² See Nys, *Le Droit de Gens et*

trading towns for the protection of their trade and trading citizens. The most celebrated of these leagues was the Hanseatic, formed in the thirteenth century. These leagues stipulated for arbitration on controversies between their member-towns. They acquired trading privileges in foreign States. They even waged war, when necessary, for the protection of their interests.

(4) A fourth factor was the growing custom on the part of the States of sending and receiving permanent legations. In the Middle Ages the Pope alone had a permanent legation at the court of the Frankish kings. Later, the Italian Republics, as Venice and Florence for instance, were the first States to send out ambassadors, who took up their residence for several years in the capitals of the States to which they were sent. At last, from the end of the fifteenth century, it became a universal custom for the kings of the different States to keep permanent legations at one another's capital. The consequence was that an uninterrupted opportunity was given for discussing and deliberating upon common international interests. And since the position of ambassadors in foreign countries had to be taken into consideration, international rules concerning inviolability and extraterritoriality of foreign envoys gradually grew up.

(5) A fifth factor was the custom of the great States of keeping standing armies, a custom which also dates from the fifteenth century. The uniform and stern discipline in these armies favoured the rise of more universal rules and practices of warfare.

(6) A sixth factor was the Renaissance and the Reformation. The Renaissance of science and art in the fifteenth century, together with the resurrection of the knowledge of antiquity, revived the philosophical and æsthetical ideals of Greek life, and transferred them to modern life. Through their influence the

spirit of the Christian religion took precedence of its letter. The conviction awoke everywhere that the principles of Christianity ought to unite the Christian world more than they had done hitherto, and that these principles ought to be observed in matters international as much as in matters national. The Reformation, on the other hand, put an end to the spiritual mastership of the Pope over the civilised world. Protestant States could not recognise the claim of the Pope to arbitrate as of right in their conflicts either between one another or between themselves and Catholic States.

(7) A seventh factor made its appearance in connection with the schemes for the establishment of eternal peace which arose from the beginning of the fourteenth century. Although these schemes were utopian, they nevertheless must have had great influence by impressing upon the princes and the nations of Christendom the necessity for some kind of organisation of the numerous independent States into a community. The first of these schemes was that of the French lawyer, Pierre Dubois, who, as early as 1305, in *De Recuperatione Terre Sancte*, proposed an alliance between all Christian Powers for the purpose of the maintenance of peace and the establishment of a Permanent Court of Arbitration for the settlement of differences between the members of the alliance.¹ Another project arose in 1461, when Podiebrad, King of Bohemia from 1420 to 1471, adopted the scheme of his Chancellor, Antoine Marini, and negotiated with foreign courts the foundation of a Federal State to consist of all the existing Christian States with a permanent Congress, seated at Basle, of ambassadors of all the member-States as the

¹ See Meyer, *Die staats- und völkerrechtlichen Ideen von Pierre Dubois* (1908); Schücking, *Die Organisation der Welt* (1909), pp.

28-30; Vesnitch, *Deux Précurseurs français du Pacifisme*, etc. (1911), pp. 1-29; Zeck, *Der Publizist Pierre Dubois* (1911).

highest organ of the Federation.¹ A third plan was that of Sully, adopted by Henri IV. of France, which proposed, in 1603, the division of Europe into fifteen States and the linking together of these into a Federation with a General Council as its highest organ, consisting of Commissioners deputed by the member-States.² A fourth project was that of Émeric Crucé, who, in 1623, proposed the establishment of a Union consisting not only of the Christian States, but of all States then existing in the whole of the world, with a General Council as its highest organ, seated at Venice, and consisting of ambassadors of all the member-States of the Union.³

¹ See Schwitzky, *Der europäische Fürstenbund Georgs von Podiebrad* (1907), and Schücking, *Die Organisation der Welt* (1909), pp. 32-36.

² See Kükelhaus, *Der Ursprung des Planes vom ewigen Frieden in den Memoiren des Herzogs von Sully* (1893); Nys, *Études de Droit international et de Droit politique* (1896), pp. 301-306, and Darby, *International Tribunals* (4th ed. 1904), pp. 10-21.

³ See Balch, *Le Nouveau Cynée de Émeric Crucé* (1909); Darby, *International Tribunals* (4th ed. 1914), pp. 22-33; Vesnitch, *Deux Précurseurs français du Pacifisme*, etc. (1911), pp. 29-54.

The schemes enumerated in the text are those which were advanced before the appearance of Grotius' work, *De Jure Belli ac Pacis* (1625). The numerous plans which made their appearance afterwards—that of the Landgrave of Hesse-Rheinfels, 1666; of Charles, Duke of Lorraine, 1688; of William Penn, 1693; of John Bellers, 1710; of the Abbé de St. Pierre (1658-1743); of Kant, 1795; and of others—are for the most part discussed in Schücking, *Die Organisation der Welt* (1909); in Darby, *International Tribunals* (4th

ed. 1904); in Lorimer, ii. pp. 216-239, who himself develops a scheme (pp. 240-299); and in Ter Meulen, *Der Gedanke der internationalen Organisation in seiner Entwicklung, 1800-1800* (1917). See on the scheme of Cardinal Alberoni (1736), Vesnitch, *Le Cardinal Alberoni Pacifiste* (1912), and in A.J., vii. (1913), pp. 51-107; see on the scheme of the Abbé de St. Pierre, Borner, *Ueber das Weltstaatsprojekt des Abbé de Saint-Pierre* (1913). They are as utopian as the pre-Grotian schemes, but they are nevertheless of great importance. They preached again and again the gospel of the organisation of the Family of Nations, and although their ideal has not been and can never be realised, they drew the attention of public opinion to the fact that the international relations of States should not be based on arbitrariness and anarchy, but on rules of law and comity. And thereby they have indirectly influenced the gradual growth of rules of law for these international relations. The outbreak of the World War in 1914 caused the appearance of numerous further plans for the establishment of eternal peace,



II

DEVELOPMENT OF THE LAW OF NATIONS
AFTER GROTIUS

Lawrence, §§ 22-33, and *Essays*, pp. 147-190—Halleck, i. pp. 14-49—Walker, *History*, i. pp. 138-202—Taylor, §§ 65-95—Hershey, Nos. 62-85—Nys, i. pp. 23-50—Martens, i. §§ 21-33—Fiore, i. Nos. 32-52—Calvo, i. pp. 32-101—Bonfils, Nos. 87-146—Despagnet, Nos. 20-27—Mérignhac, i. pp. 43-79—Ullmann, §§ 15-17—Laurent, *Histoire du Droit des Gens*, etc., 14 vols. (2nd ed. 1861-1868)—Wheaton, *Histoire des Progrès du Droit des Gens en Europe* (1841)—Bulmerincq, *Die Systematik des Völkerrechts* (1858)—Pierantoni, *Storia del Diritto internazionale nel Secolo xix.* (1876)—Hosack, *Rise and Growth of the Law of Nations* (1882), pp. 227-319—Brie, *Die Fortschritte des Völkerrechts seit dem Wiener Congress* (1890)—Gareis, *Die Fortschritte des internationalen Rechts im letzten Menschenalter* (1905)—Dupuis, *Le Principe d'Équilibre et le Concert européen de la Paix de Westphalie à l'Acte d'Algésiras* (1909)—Strupp, *Urkunden zur Geschichte des Völkerrechts*, 2 vols. (1911)—Conner, *The Development of Belligerent Occupation* (1912)—Hill, *History of Diplomacy in the International Development of Europe*, vol. iii. (1914)—Muir, *Nationalism and Internationalism* (1916)—Phillimore, *Three Centuries of Treaties of Peace and their Teaching* (1917), pp. 13-111—Hershey in *A.J.*, vi. (1912), pp. 30-67.

§ 43. The seventeenth century found a multitude of independent States established and crowded on the comparatively small continent of Europe. Many interests and aims knitted these States together into a community of States. International lawlessness was henceforth an impossibility. This was the reason for the fact that Grotius' work, *De Jure Belli ac Pacis, libri iii.*, which appeared in 1625, won the ear of the different States, their rulers, and their writers on matters international. Since a Law of Nations was now a necessity, since many principles of such a law were already more or less recognised and appeared again among the doctrines of Grotius, since the system of Grotius supplied a legal basis to most of those international relations which were at the time considered as wanting such basis, the book of Grotius obtained

The
Time of
Grotius.

such a world-wide influence that he is correctly styled the 'Father of the Law of Nations.' It would be very misleading, and in no way congruent with the facts of history, to believe that Grotius' doctrines were as a body at once universally accepted. No such thing happened, nor could have happened. What did soon take place was that, whenever an international question of legal importance arose, Grotius' book was consulted, and its authority was so overwhelming that in many cases its rules were considered right. How those rules of Grotius, which have more or less quickly been recognised by the common consent of the writers on International Law, have gradually received similar acceptance at the hands of the Family of Nations, is a process of development which in each single phase cannot be ascertained. It can only be stated that at the end of the seventeenth century the civilised States considered themselves bound by a Law of Nations, the rules of which were to a great extent the rules of Grotius. This does not mean that these rules have from the end of that century never been broken. On the contrary, they have frequently been broken. Although the several Governments recognised the Law of Nations when its rules suited their interests, consciously or unconsciously they violated it in many cases, when they thought that a rule was opposed to their interests. But whenever this occurred, the Governments concerned maintained either that they did not intend to break these rules, or that their acts were in harmony with them, or that they were justified by just causes and circumstances in breaking them. And the development of the Law of Nations did not come to a standstill with the reception of the bulk of the rules of Grotius. More and more rules were gradually required, and therefore gradually grew. All the historically important events and facts of international life from the time of Grotius down to our own

have, on the one hand, given occasion to the manifestation of the existence of a Law of Nations, and, on the other hand, in their turn made the Law of Nations constantly and gradually develop into a more perfect and more complete system of legal rules. In practice the attitude of Governments towards the Law of Nations has been essentially the same up to our days as it was in former times. They have recognised it explicitly; they have referred to it whenever their interests demanded it; but, consciously or unconsciously, they frequently attempt to evade a rule when they think that their interests demand such evasion. Yet the fact that they recognise it indirectly, even if they break it, because they never admit that they are breaking it, makes the Law of Nations a living reality in spite of everything working against it.

It serves the purpose to divide the history of the development of the Law of Nations from the time of Grotius into nine periods—namely, 1648-1721, 1721-1789, 1789-1815, 1815-1856, 1856-1874, 1874-1899, 1899-1914, 1914-1918, 1918-1920.

§ 44. The ending of the Thirty Years' War through the Westphalian Peace of 1648 is the first event of great importance after the death of Grotius in 1645. What makes remarkable the meetings of Osnabrück, where the Protestant Powers met, and Münster, where the Catholic Powers met, is the fact that there was for the first time in history a European Congress assembled for the purpose of settling matters international by common consent of the Powers. With the exception of England, Russia, and Poland, all the important Christian States were represented at this Congress, as were also the majority of the minor Powers; and all the Powers represented concluded peace, except France and Spain, whose forces went on fighting for another eleven years. The arrangements made by the Congress

The
period
1648-
1721.

show what a great change had taken place in the condition of matters international. The Swiss Confederation and the Netherlands were recognised as independent States. The 332 different States which belonged to the German Empire were practically, although not theoretically, recognised as independent States which formed a Confederation under the Emperor as its head. Of these 332 States, 211 were secular States governed by hereditary monarchs (Electors, Dukes, Landgraves, and the like), 56 were free-city States, and 65 were ecclesiastical States governed by archbishops and other Church dignitaries. The theory of the unity of the civilised world under the German Emperor and the Pope as its temporal and spiritual heads was buried for ever. A multitude of recognised independent States formed a community on the basis of equality of all its members. The conception of the European equilibrium¹ made its appearance, and became an implicit principle as a guaranty of the independence of the members of the Family of Nations. Protestant States took up their position within this family along with Catholic States, as did Republics along with Monarchies.

In the second half of the seventeenth century² the policy of conquest initiated by Louis XIV. of France led to numerous wars. But Louis XIV. always pleaded a just cause when he made war, and even the establishment of the ill-famed so-called Chambers of Reunion (1680-1683) was done under the pretext of law. *There was no later period in history in which the principles of International Law were more frivolously violated, but the violation was always cloaked by some excuse.* Five treaties of peace between France and other Powers during the

¹ See below, § 51.

² The history of International Law during the seventeenth and eighteenth centuries is intimately connected with the history of diplo-

macy. Students must therefore be advised to read the third volume of Hill's excellent work, *A History of Diplomacy in the International Development of Europe*.

reign of Louis XIV. are of great importance : (1) The Peace of the Pyrenees, which ended in 1659 the war between France and Spain, who had not come to terms at the Westphalian Peace. (2) The Peace of Aix-la-Chapelle, which ended in 1668 another war between France and Spain, commenced in 1667, because France claimed the Spanish Netherlands from Spain. This peace was forced upon Louis XIV. through the triple alliance between England, Holland, and Sweden. (3) The Peace of Nymeguen, which ended in 1678 the war originally commenced by Louis XIV. in 1672 against Holland, into which many other European Powers were drawn, and out of which England had already emerged in 1674 by the Treaty of Westminster. (4) The Peace of Ryswick, which ended in 1697 the war that had existed since 1688 between France on one side, and, on the other, England, Holland, Germany, and Spain. (5) The Peace of Utrecht, 1713, and the Peace of Rastadt and Baden, 1714, which ended the war of the Spanish Succession that had lasted since 1701 between France and Spain on the one side, and, on the other, England, Holland, Portugal, Prussia, and Savoy.

But wars were not only waged between France and other Powers during this period. The following treaties of peace must therefore be mentioned : (1) The Peaces of Roeskild (1658), Oliva (1660), Copenhagen (also 1660), and Kardis (1661). The contracting Powers were Sweden, Denmark, Poland, Prussia, and Russia. (2) The Peace of Breda (1667) between England and the Netherlands. (3) The Peace of Carlowitz, 1699, between Turkey, Austria, Poland, and Venice. (4) The Peace of Nystaedt, 1721, between Sweden and Russia under Peter the Great.

The year 1721 is epoch-making, because with the Peace of Nystaedt Russia enters as a member into the Family of Nations, in which she at once takes the posi-

tion of a Great Power. The period ended by the year 1721 shows in many points progressive tendencies regarding the Law of Nations. Thus the right of visit and search on the part of belligerents over neutral vessels became recognised. The rule 'free ships, free goods,' rose as a general postulate, and was embodied in a number of treaties of commerce, although it was not universally recognised till 1856. The effectiveness of blockades, which were first made use of in war by the Netherlands in 1584 and 1630, likewise rose as a general postulate and became recognised in treaties between Holland and Sweden (1667) and Holland and England (1674), although its universal recognition was not realised until the nineteenth century. The freedom of the high seas, claimed by Grotius and others, began gradually to obtain recognition in practice, although it also did not meet with universal acceptance till the nineteenth century. The balance of power was solemnly recognised by the Peace of Utrecht as a necessary principle without which the Law of Nations could not exist.

The
period
1721-
1789.

§ 45. Before the end of the first half of the eighteenth century peace in Europe was again disturbed. The rivalry between Austria and Prussia, which had become a Kingdom in 1701 and the throne of which Frederick II. had ascended in 1740, led to several wars in which England, France, Spain, Bavaria, Saxony, and Holland took part. Several treaties of peace were successively concluded which tried to keep up or re-establish the balance of power in Europe. The most important of these treaties were: (1) The Peace of Aix-la-Chapelle of 1748 between France, England, Holland, Austria, Prussia, Sardinia, Spain, and Genoa. (2) The Peace of Hubertsburg and the Peace of Paris, both of 1763, the former between Prussia, Austria, and Saxony, the latter between England, France, and Spain. (3) The

Peace of Versailles of 1783 between England, the United States of America, France, and Spain.

An event of great importance, which showed that International Law was to some extent a sham, was the first act in the partition of Poland between Prussia, Russia, and Austria in 1772. It was only the precursor of a second partition in 1793, and a third in 1795, by which the national State of a highly-gifted people was wiped from the map of Europe.

The wars of this period gave occasion to disputes as to the rights of neutrals and belligerents regarding trade in time of war.¹ Prussia became a Great Power. The so-called First Armed Neutrality² made its appearance in 1780 with claims of great importance, which were not generally recognised till 1856. The United States of America³ succeeded in establishing her independence, and became a member of the Family of Nations, whose future attitude fostered the growth of several rules of International Law.⁴

§ 46. All progress, however, was endangered, and indeed the Law of Nations seemed partly non-existent during the time of the French Revolution and the Napoleonic wars. Although the French Convention resolved in 1792 (as stated above, § 30) to create a 'Declaration of the Rights of Nations,' the Revolutionary Government, and afterwards Napoleon I., very often showed no respect for the rules of the Law of Nations. The whole order of Europe, which had been built up by the Westphalian and subsequent treaties of peace for the purpose of maintaining a balance of power, was overthrown. Napoleon I. was for some time the

The
period
1789-
1815.

¹ For the rule of 1756 see below, vol. ii. § 289 and § 400 n.

² See Reeves in *A.J.*, iii. (1909), pp. 547-561.

³ See below, vol. ii. §§ 289 and 290, where details concerning the First and Second Armed Neutrality are given.

⁴ On American influence upon International Law see Westengard in the *Journal of Comparative Legislation*, New Ser. xviii, (1918), pp. 2-14.

master of Europe, Russia and England excepted. He arbitrarily created States and suppressed them again. He divided existing States into portions and united separate States. The kings depended upon his goodwill, and they had to follow orders when he commanded. Especially as regards maritime International Law, a condition of partial lawlessness arose during this period. Already in 1793 England and Russia interdicted all navigation with the ports of France, with the intention of subduing her by famine. The French Convention answered with an order to the French fleet to capture all neutral ships carrying provisions to the ports of the enemy or carrying enemy goods. Again Napoleon, who wanted to ruin England by destroying her commerce, announced in 1806 in his Berlin Decrees the boycott of all English goods. England answered ¹ with the blockade of all French ports and all ports of the allies of France, and ordered her fleet to capture all ships destined to any such port.

When at last the whole of Europe was mobilised against Napoleon ² and he was finally defeated, the whole face of Europe was changed, and the former order of things could not possibly be restored. It was the task of the European Congress of Vienna in 1814 and 1815 to create a new order and a fresh balance of power. This new order comprised chiefly the following arrangements: The Prussian and the Austrian monarchies were re-established, as was also the Germanic Confederation, which consisted thenceforth of thirty-nine member-States. A Kingdom of the Netherlands was created out of Holland and Belgium. Norway and Sweden became a Real Union. The old dynasties were

¹ The legal aspect of the English Orders in Council of 1807 is well discussed in Reddie, *Researches*, ii. pp. 23-37. See also Stockder in *A.J.*, x. (1916), pp. 492-508.

² See Schönkank in *Z.F.*, viii. pp. 233-246, who gives an interesting account of some of the practices during the war of 1813-1815.

restored in Spain, in Sardinia, in Tuscany, and in Modena, as was also the Pope in Rome. To the nineteen cantons of the Swiss Confederation were added those of Geneva, Valais, and Neuchâtel, and this Confederation was neutralised for all the future. The Grand Duchy of Poland became a Kingdom in union with Russia, but with a separate Government and the official use of the Polish language. The town of Cracow, with its surrounding territory, was set up as a free, independent, and neutralised Republic,¹ under the protection of Russia, Austria, and Prussia.

But the Vienna Congress did not only establish a new political order in Europe; it also settled some questions of International Law. Thus, free navigation was agreed to on so-called international rivers, which are rivers navigable from the open sea and running through the land of different States. It was further arranged that thenceforth diplomatic agents should be divided into three classes (Ambassadors, Ministers, *Chargés d'Affaires*). Lastly, a universal prohibition of the trade in negro slaves was agreed upon.

§ 47. The period after the Vienna Congress begins with the so-called Holy Alliance. Already on September 26, 1815, before the second Peace of Paris, the Emperors of Russia and Austria, and the King of Prussia, called this alliance into existence, the object of which was to place a duty upon its members to apply the principles of Christian morality in the administration of the home affairs of their States, as well as in the conduct of their international relations. After the Vienna Congress the sovereigns of almost all the European States had joined that alliance with the exception of England. George IV., at that time prince-regent only, did not join, because the Holy Alliance was an alliance not of the States, but of sovereigns, and there-

The period
1815-
1856.

¹ It was suppressed, and its territory annexed by Austria, in 1846.

fore was concluded without the signatures of the respective responsible Ministers, whereas according to the English Constitution the signature of such a responsible Minister would have been necessary.

The Holy Alliance had not, as such, any importance for International Law, for it was a religious, moral, and political, but scarcely a legal alliance. But at the Congress of Aix-la-Chapelle in 1818, which the Emperors of Russia and Austria and the King of Prussia attended in person, and where it might be said that the principles of the Holy Alliance were applied in practice, the Great Powers signed a declaration,¹ in which they solemnly recognised the Law of Nations as the basis of all international relations, and in which they pledged themselves for all the future to act according to its rules. The leading principle of their politics was that of legitimacy,² as they endeavoured to preserve everywhere the old dynasties, and to protect the sovereigns of the different countries against revolutionary movements of their subjects. This led, in fact, to a dangerous neglect of the principles of International Law regarding intervention. The Great Powers, with the exception of England, intervened constantly in the domestic affairs of the minor States in the interest of the legitimate dynasties and of an anti-liberal legislation. The Congresses at Troppau, 1820, Laibach, 1821, Verona, 1822, occupied themselves with a deliberation on such interventions.

The famous Monroe Doctrine (see below, § 139) owes its origin to that dangerous policy of the European Powers as regards intervention, although this doctrine embraces other points besides intervention. As, from 1810 onwards, the Spanish³ colonies in South America

¹ See Martens, *N.R.*, iv. p. 560.

² See Brockhaus, *Das Legitimitäts-princip* (1868).

³ The Portuguese colony of Brazil declared its independence in 1822,

and became an Empire under Don Pedro, the brother of the King of Portugal. It was not until 1889 that Brazil became a Republic.

were falling off from the mother country and declaring their independence, and as Spain was, after the Vienna Congress, thinking of reconquering these States with the help of other Powers who upheld the principle of legitimacy, President Monroe delivered his message on December 2, 1823, which pointed out, amongst other things, that the United States could not allow the interference of a European Power with the States of the American continent.

Different from the intervention of the Powers of the Holy Alliance in the interest of legitimacy were the two interventions in the interest of Greece and Belgium. England, France, and Russia intervened in 1827 in the struggle between Turkey and the Greeks, an intervention which led finally in 1830 to the independence of Greece. And the Great Powers of the time, namely, England, Austria, France, Prussia, and Russia, invited by the provisional Belgian Government, intervened in 1830 in the struggle between the Dutch and the Belgians, and secured the formation of a separate Kingdom of Belgium.

It may be maintained that the establishment of Greece and Belgium implied the breakdown of the Holy Alliance. But it was not till the year 1848 that this alliance was totally swept away through the disappearance of absolutism and the victory of the constitutional system in most States of Europe. Shortly afterwards, in 1852, Napoleon III., who adopted the principle of nationality,¹ became Emperor of France. Since he exercised preponderant influence in Europe, one may say that this principle of nationality superseded in European politics the principle of legitimacy.

The last event of this period was the Crimean War, which led to the Peace as well as to the Declaration

¹ See Bulmerincq, *Praxis, Theorie und Codification des Völkerrechts* (1874), pp. 53-70.

of Paris in 1856. This war broke out in 1853 between Russia and Turkey. In 1854, England, France, and Sardinia joined Turkey, but the war continued nevertheless for another two years. Finally, however, Russia was defeated, a Congress assembled at Paris, where England, France, Austria, Russia, Sardinia, Turkey, and eventually Prussia, were represented, and peace was concluded in March 1856. In the Peace Treaty, Turkey is expressly received as a member into the Family of Nations. Of greater importance, however, is the celebrated Declaration of Paris regarding maritime International Law which was signed on April 16, 1856, by the delegates of the Powers that had taken part in the Congress. This declaration abolished privateering, recognised the rules that enemy goods on neutral vessels and that neutral goods on enemy vessels cannot be confiscated, and stipulated that a blockade in order to be binding must be effective. Together with the fact that at the end of the first quarter of the nineteenth century the principle of the freedom of the high seas¹ became universally recognised, the Declaration of Paris is a prominent landmark in the progress of the Law of Nations. The Powers that had not been represented at the Congress of Paris were invited to sign the declaration afterwards, and the majority of the members of the Family of Nations did sign it before the end of the year 1856. The few States, such as the United States of America, Spain, Mexico, and others, which did not then sign,² have in practice, since 1856, not acted in opposition to the declaration, and Japan acceded to it in 1886, Spain in 1908, and Mexico in 1909. One may therefore, perhaps, maintain that the Declaration of Paris has already become, or will

¹ See below, § 251.

² It should be mentioned that the United States did not sign the Declaration of Paris because it did

not go far enough, and did not interdict capture of private enemy vessels.

soon become, universal International Law through custom.¹

§ 48. The next period, the time from 1856 to 1874, ^{The period 1856-1874.} is of prominent importance for the development of the Law of Nations. Under the ægis of the principle of nationality, Austria turns in 1867 into the dual monarchy of Austria-Hungary, and Italy as well as Germany become united. The unity of Italy rises out of the war waged by France and Sardinia against Austria in 1859, and Italy ranges henceforth among the Great Powers of Europe. The unity of Germany is the combined result of three wars: that of Austria and Prussia in 1864 against Denmark on account of Schleswig-Holstein, that of Prussia and Italy against Austria in 1866, and that of Prussia and the allied South German States against France in 1870. The defeat of France in 1870 has the consequence that Italy takes possession of the Papal States, whereby the Pope disappears from the number of governing sovereigns.

The United States of America rises through the successful termination of the Civil War in 1865 to the position of a Great Power. Several rules of maritime International Law owe their further development to this war. And the instructions concerning warfare on land, published in 1863 by the Government of the United States, represent the first step towards codification of the Laws of War. In 1864 the Geneva Convention for the amelioration of the condition of soldiers wounded in armies in the field is, on the initiation of Switzerland, concluded by nine States, and in time almost all civilised States become parties to it. In 1868 the Declaration of St. Petersburg, interdicting the employment in war of explosive balls below a certain weight, is signed by many States. Since Russia in 1870 had arbitrarily shaken off the restrictions of Article 11 of the Peace

¹ The question is discussed in *The Marie Gläser*, 1 B. and C.P.C. 53.

Treaty of Paris of 1856 neutralising the Black Sea, the Conference of London, which met in 1871, and was attended by the representatives of the Powers which were parties to the Peace of Paris of 1856, solemnly proclaimed 'that it is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a treaty, or modify the stipulations thereof, unless with the consent of the contracting Powers by means of an amicable arrangement.' The last event in this period is the Conference of Brussels of 1874 for the codification of the rules and usages of war on land. Although the signed code was never ratified, the Brussels Conference was nevertheless epoch-making, since it showed the readiness of the Powers to come to an understanding regarding such a code.

The
period
1874-
1899.

§ 49. After 1874 the principle of nationality continues to exercise its influence as before. Under its ægis takes place the partial decay of the Ottoman Empire. The refusal of Turkey to introduce reforms regarding the Balkan population leads in 1877 to war between Turkey and Russia, which is ended in 1878 by the Peace of San Stefano. As the conditions of this treaty would practically have done away with Turkey in Europe, England intervenes, and a European Congress assembles at Berlin in June 1878, which modifies materially the conditions of the Peace of San Stefano. The chief results of the Berlin Congress are: (1) Serbia, Roumania, and Montenegro become independent and sovereign States; (2) Bulgaria becomes an independent principality under Turkish suzerainty; (3) the Turkish provinces of Bosnia and Herzegovina come under the administration of Austria-Hungary; (4) a new province under the name of Eastern Rumelia is created in Turkey, and is to enjoy great local autonomy, (according to an arrangement of the Conference of Constantinople in 1885-1886 a bond is created between Eastern Rumelia

and Bulgaria by the appointment of the Prince of Bulgaria as governor of Eastern Rumelia); (5) free navigation on the Danube from the Iron Gates to its mouth in the Black Sea is proclaimed.

In 1889 Brazil becomes a Republic and a Federal State (the United States of Brazil). In the same year the first Pan-American Congress meets at Washington.

In 1897 Crete revolts against Turkey, war breaks out between Greece and Turkey, the Powers interfere, and peace is concluded at Constantinople. Crete becomes an autonomous half sovereign State under Turkish suzerainty with Prince George of Greece as governor, who, however, retires in 1906.

In the Far East war breaks out in 1894 between China and Japan, on account of Korea. China is defeated, and peace is concluded in 1895 at Shimonoseki.¹ Japan henceforth ranks as a Great Power. That she must from this time be considered a full member of the Family of Nations becomes apparent from the treaties concluded soon afterwards by her with other Powers for the purpose of abolishing their consular jurisdiction within the boundaries of Japan.

In America the United States intervenes in 1898 in the revolt of Cuba against the motherland, whereby war breaks out between Spain and the United States. The defeat of Spain secures the independence of Cuba through the Peace of Paris² of 1898. The United States acquires Porto Rico and other Spanish West Indian Islands, and, further, the Philippine Islands, whereby she becomes a colonial Power.

An event of great importance during this period is the Congo Conference of Berlin, which took place in 1884-1885, and at which England, Germany, Austria-

¹ See Martens, *N.R.G.*, 2nd Ser. xxi. p. 642.

² See Martens, *N.R.G.*, 2nd Ser.

xxxii. p. 74, and Benton, *International Law and Diplomacy of the Spanish-American War* (1908).

Hungary, Belgium, Denmark, Spain, the United States of America, France, Italy, Holland, Portugal, Russia, Sweden-Norway, and Turkey were represented. This Conference stipulated freedom of commerce, interdiction of slave-trade, and neutralisation of the territories in the Congo district, and secured freedom of navigation on the rivers Congo and Niger. The so-called Congo Free State was recognised as a member of the Family of Nations.¹

A second fact of great importance during this period is the movement towards the conclusion of international agreements concerning matters of international administration. This movement finds expression in the establishment of numerous International Unions with special International Offices. Thus a Universal Telegraphic Union is established in 1875, a Universal Postal Union in 1878, a Union for the Protection of Industrial Property in 1883, a Union for the Protection of Works of Literature and Art in 1886, a Union for the Publication of Custom Tariffs in 1890. There are also concluded conventions concerning: (1) Private International Law (1900 and 1902); (2) Railway Transports and Freights (1890); (3) the Metric System (1875); (4) Phylloxera Epidemics (1878 and 1881); (5) Cholera and Plague Epidemics (1893, 1894, etc.); (6) Monetary Unions (1865, 1878, 1885, 1893).

A third fact of great importance is that in this period a tendency arises to settle international conflicts more frequently than in former times by arbitration. Numerous arbitrations actually take place, and several treaties are concluded between different States stipulating the settlement by arbitration of all conflicts which might arise in future between the contracting parties.

The last fact of great importance which is epoch-making for this period is the Peace Conference of the

¹ It lost its membership in 1908 (see above, § 28 (6), and below, § 50).

Hague of 1899. This Conference produces, apart from three declarations of minor importance, a Convention for the Pacific Settlement of International Conflicts, a Convention regarding the Laws and Customs of War on Land, and a Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention. It also formulates, among others, the three wishes (1) that a Conference should in the near future regulate the rights and duties of neutrals; (2) that a future Conference should contemplate a declaration of the inviolability of private property in naval warfare; (3) that a future Conference should settle the question of the bombardment of ports, towns, and villages by naval forces.

§ 50. Soon after the Hague Peace Conference, in October 1899, war breaks out in South Africa between Great Britain and the two Boer Republics, which leads to their subjugation at the end of 1901. The assassination on June 10, 1900, of the German Minister and the general attack on the foreign legations at Peking necessitate united action of the Powers against China for the purpose of vindicating this violation of the fundamental rules of the Law of Nations. Friendly relations are, however, re-established with China on her submitting to the conditions enumerated in the Final Protocol of Peking,¹ signed on September 7, 1901. In December 1902, Great Britain, Germany and Italy institute a blockade of the coast of Venezuela for the purpose of making her comply with their demands for the indemnification of their subjects wronged during civil wars in Venezuela, and the latter consents to pay indemnities to be settled by a mixed commission of diplomatists.² As, however, Powers other than those blockading likewise claim indemnities, the matter is

¹ See Martens, *N.R.G.*, [2nd Ser. xxxii, p. 94.

² See Martens, *N.R.G.*, [3rd Ser. i. p. 46.

referred to the Permanent Court of Arbitration at the Hague, which in 1904 gives its award ¹ in favour of the blockading Powers. In February 1904 war breaks out between Japan and Russia ² on account of Manchuria and Korea. Russia is defeated, and peace is concluded through the mediation of the United States of America, on September 5, 1905, at Portsmouth.³ Korea, now freed from the influence of Russia, places herself by the Treaty of Seoul ⁴ of November 17, 1905, under the protectorate of Japan. Five years later, however, by the Treaty of Seoul ⁵ of August 22, 1910, she merges entirely into Japan.

The Real Union between Norway and Sweden, which was established by the Vienna Congress in 1815, is peacefully dissolved by the Treaty of Stockholm (Karlstad) ⁶ of October 26, 1905. Norway becomes a separate Kingdom under Prince Charles of Denmark, who takes the name of Haakon VII., and Great Britain, Germany, Russia, and France guarantee by the Treaty of Christiania ⁷ of November 2, 1907, the integrity of Norway on condition that she would not cede any part of her territory to any foreign Power.

The rivalry between France and Germany—the latter protesting against the position conceded to France in Morocco by the Anglo-French agreement signed at London on April 8, 1904—leads in January 1906 to the Conference of Algeciras, in which Great Britain, France, Germany, Belgium, Holland, Italy, Austria-Hungary, Portugal, Russia, Sweden, Spain, and the United States of America take part, and where, on April 7, 1906, the

¹ See Martens, *N.R.G.*, 3rd Ser. i. p. 57.

² See Hershey, *The International Law and Diplomacy of the Russo-Japanese War* (1906).

³ See Martens, *N.R.G.*, 2nd Ser. xxxiii. p. 3.

⁴ See Martens, *N.R.G.*, 2nd Ser. xxxiv. p. 727.

⁵ See Martens, *N.R.G.*, 3rd Ser. iv. p. 24.

⁶ See Martens, *N.R.G.*, 2nd Ser. xxxiv. p. 700.

⁷ See Martens, *N.R.G.*, 3rd Ser. i. p. 14, and ii. p. 9, and below, § 574.

General Act of the International Conference of Algeciras¹ is signed. This Act, which recognises, on the one hand, the independence and integrity of Morocco, and, on the other, equal commercial facilities for all nations in that country, contains: (1) a declaration concerning the organisation of the Moroccan police; (2) regulations concerning the detection and suppression of the illicit trade in arms; (3) an Act of concession for a Moroccan State Bank; (4) a declaration concerning an improved yield of the taxes and the creation of new sources of revenue; (5) regulations respecting customs and the suppression of fraud and smuggling; (6) a declaration concerning the public services and public works. But this Act does not produce a condition of affairs of any permanency. Since, in 1911, internal disturbances in Morocco lead to military action on the part of France and Spain, Germany, in July of the same year, sends a man-of-war to the port of Agadir. As the Moroccan question has been reopened, fresh negotiations for its settlement take place, and on November 4, 1911, France and Germany sign two treaties,² by which a French protectorate of Morocco is recognised, and as a *quid pro quo* France cedes a part of her Congo territory to Germany.

On December 13, 1906, Great Britain, France, and Italy sign the Treaty of London,³ by which they agree to co-operate in maintaining the independence and integrity of Abyssinia.

On August 18, 1907, Great Britain and Russia sign the Treaty of St. Petersburg,⁴ concerning Persia, Afghanistan, and Thibet. The integrity and independence of Persia and of Afghanistan, and the protectorate

¹ See Martens, *N.R.G.*, 2nd Ser. xxxv. p. 556, and 3rd Ser. v. p. xxxiv. p. 238.

² See Martens, *N.R.G.*, 3rd Ser. v. p. 645.

³ See Martens, *N.R.G.*, 2nd Ser.

⁴ See Martens, *N.R.G.*, 3rd Ser. i. p. 8.

of China over Thibet are recognised, and arrangements are made concerning economic conditions in these countries.

Two events of importance occur in 1908. The first is the merging of the Congo Free State¹ into Belgium. The other is the crisis in the Near East caused by the ascendancy of the so-called Young Turks and the introduction of a constitution in Turkey. Simultaneously, on October 5, 1908, Bulgaria declares herself independent, and Austria-Hungary proclaims her sovereignty over Bosnia and Herzegovina, two Turkish provinces which had been under her administration since 1878. This violation of the Treaty of Berlin considerably endangers the peace of the world, and an international conference is proposed for the purpose of reconsidering the settlement of the Near Eastern question. Austria-Hungary, however, does not consent to this, but prefers to negotiate with Turkey alone in the matter, and a Protocol² is signed by the two Powers on February 26, 1909, according to which Turkey receives a substantial indemnity in money and other concessions. Austria-Hungary negotiates likewise with Montenegro alone, and consents to the modifications in Article 29 of the Treaty of Berlin concerning the harbour of Antivary, which is to be freed from Austro-Hungarian control, and is henceforth to be open to warships of all nations. Whereupon the demand for an international conference is abandoned, and the Powers notify,³ on April 7, 1909, their consent to the abolition of Article 25 and the amendment of Article 29 of the Treaty of Berlin.

In 1910 Portugal becomes a Republic; but the Powers, although they enter provisionally into communication with the *de facto* Government, do not recog-

¹ See Martens, *N.R.G.*, 3rd Ser. ii. p. 101.

² See Martens, *N.R.G.*, 3rd Ser. ii. p. 661.

³ See Martens, *N.R.G.*, 3rd Ser. iv. p. 31; Błociszewski in *R.G.*, xvii. (1910), pp. 417-449; and Krunski, *L'Annexion de la Bosnie et de l'Herzégovine en 1908* (1912).

nise the Republic until September 1911, after the National Assembly has adopted the republican form of government.

In September 1911 war breaks out between Italy and Turkey, on account of the alleged maltreatment of Italian subjects in Tripoli. Turkey is defeated, and cedes by the Peace Treaty of Lausanne¹ of October 18, 1912, Tripoli and Cyrenaica to Italy. But before this treaty is signed, Bulgaria, Greece, Montenegro, and Serbia declare war against Turkey, and the war comes to an end by the Peace Treaty of London² of May 17, 1913, by which Turkey cedes the greater part of her European territory to her adversaries, and the island of Crete to Greece. The fate of the Turkish islands in the *Ægean* Sea is to be settled by the six Great Powers of Europe, and Albania is constituted an independent State. However, even before this treaty is ratified, war breaks out between Bulgaria on the one hand, and Greece, Serbia, Montenegro, and Roumania on the other. Turkey likewise makes war on Bulgaria. The latter is defeated, and peace is concluded at Bucharest on July 28, 1913, and at Constantinople on September 16, 1913.³

In 1914 the United States intervenes in Mexico. American forces occupy Vera Cruz, but withdraw on November 23.⁴

International Law as a body of rules for the international conduct of States makes steady progress during this period. This is evidenced by congresses, conferences, and law-making treaties. Of conferences and

¹ See Martens, *N.R.G.*, 3rd Ser. vii. p. 7, and Barclay, *The Turco-Italian War and its Problems* (1912); Rapisardi-Mirabelli in *R.I.*, 2nd Ser. xiv. (1912), pp. 159-186, 411-448; xv. (1913), pp. 85-138, 523-584, 649-672.

² See Martens, *N.R.G.*, 3rd Ser. viii. p. 16.

³ See Martens, *N.R.G.*, 3rd Ser. viii. pp. 61 and 78.

⁴ *A.J.*, x. (1916), p. 357. In 1915

the United States recognises the Government of Carranza as the *de facto* Government of Mexico. In March 1916 American forces again enter Mexico, in agreement with the Carranza Government; they are, however, withdrawn in January 1917. See *A.J.*, xi. (1917), pp. 399-406. In May 1920, as this volume goes to press, revolution breaks out in Mexico.

congresses must be mentioned the second, third, and fourth Pan-American Congresses,¹ which take place at Mexico in 1901, at Rio in 1906, and at Buenos Ayres in 1910. Although the law-making treaties of these congresses have not found ratification, their importance cannot be denied. The first Pan-American Scientific Congress meets at Santiago in 1908.² Further, in 1906 a conference assembles in Geneva for the purpose of revising the Geneva Convention of 1864 concerning the wounded in land warfare, and on July 6, 1906, the new Geneva³ Convention is signed. Of the greatest importance, however, are the second Hague Peace Conference of 1907, and the Naval Conference of London of 1908-1909.

The second Peace Conference assembles at the Hague on June 15, 1907. Whereas at the Conference of 1899 only 26 States were represented, 44 are represented at the second Peace Conference. The result of this Conference is contained in its Final Act,⁴ which is signed on October 18, 1907, and embodies no fewer than thirteen law-making conventions, besides a declaration of minor importance. Of these conventions, 1, 4, and 10 are mere revisions of conventions agreed upon at the first Peace Conference of 1899, but the others are new, and concern: the employment of force for the recovery of contract debts (2); the commencement of hostilities (3); the rights and duties of neutrals in land warfare (5); the status of enemy merchant ships at the outbreak of hostilities (6); the conversion of merchantmen into men-of-war (7); the laying of submarine mines (8); the bombardment by naval forces (9); restrictions on the right of capture in maritime war (11); the estab-

¹ See Moore, vi. § 969; Fried, *Pan-America* (1910); Barrett, *The Pan-American Union* (1911).

² *A.J.*, ix. (1915), p. 919. The second Pan-American Scientific

Congress met at Washington in 1915. *A.J.*, x. (1916), p. 130.

³ See Martens, *N.E.G.*, 3rd Ser. ii. p. 323.

⁴ See Martens, *N.E.G.*, 3rd Ser. iii. p. 323.

lishment of an International Prize Court (12); the rights and duties of neutrals in maritime war (13).

The Naval Conference of London assembles on December 4, 1908, for the purpose of discussing the possibility of creating a code of prize law, without which the International Prize Court, agreed upon at the second Hague Peace Conference, could not be established, and produces the Declaration of London, signed on February 26, 1909. This declaration contains 71 articles, and sought to settle in nine chapters the law concerning: (1) blockade; (2) contraband; (3) unneutral service; (4) destruction of neutral prizes; (5) transfer to a neutral flag; (6) enemy character; (7) convoy; (8) resistance to search; and (9) compensation. The declaration is accompanied by a General Report on its stipulations which is intended to serve as an official commentary. Although the Declaration of London remains unratified, it is a landmark in the history of International Law, because in it is embodied the first attempt of the Powers to create a code of prize law. There is no doubt that in some future time the attempt will be renewed.

The movement which began in the last half of the nineteenth century towards the conclusion of international agreements concerning matters of international administration, develops favourably during this period. The following conventions are the outcome of this movement: (1) concerning the preservation of wild animals, birds, and fish in Africa (1900); (2) concerning international hydrographic and biological investigations in the North Sea (1901); (3) concerning protection of birds useful for agriculture (1902); (4) concerning the production of sugar (1902); (5) concerning the White Slave traffic (1904); (6) concerning the establishment of an International Agricultural Institute at Rome (1905); (7) concerning unification of the Pharmacopœia

Formulae (1906) ; (8) concerning the prohibition of the use of white phosphorus (1906) ; (9) concerning the prohibition of night work for women (1906) ; (10) concerning the international circulation of motor vehicles (1909) ; concerning uniform rules with respect to collisions, assistance, and salvage at sea (1910) ; concerning the suppression of obscene publications (1911) ; concerning international radio-telegraphy (1912) ; concerning the traffic in opium (1912 and 1914) ; concerning the safety of life at sea (1914).

It is, lastly, of the greatest importance to mention that the so-called peace movement,¹ which aims at the settlement of all international disputes by arbitration, or by judicial decision of an international court, gains considerable influence over the Governments and public opinion everywhere since the first Hague Peace Conference. A great number of arbitration treaties are agreed upon, and the Permanent Court of Arbitration established at the Hague gives its first award² in a case in 1902 and its fifteenth in 1914. The influence of these decisions upon the peaceful settlement of international differences generally is enormous. It is a hopeful sign that, whereas most of the existing arbitration treaties exempt conflicts which concern the vital interests, the honour, and the independence of the parties, Argentina and Chili in 1902, Denmark and Holland in 1904, Denmark and Italy in 1905, Denmark and Portugal in 1907, Argentina and Italy in 1907, the Central American Republics of Costa Rica, Guatemala, Honduras, Nicaragua, and San Salvador in 1907, and Italy and Holland in 1909, enter into general arbitration treaties according to which *all* differences, without any exception, shall be settled by arbitration. Likewise remarkable are the Bryan Peace Treaties, that general series of treaties initiated by

¹ See Fried, *Handbuch der Friedens-Bewegung*, 2nd ed., vol. i. 1911, vol. ii. 1913.

² See below, § 476.

Mr. Bryan in 1914, when Secretary of State at Washington, and made between the United States and no less than thirty other States. These treaties provide that, in cases where diplomacy fails to effect a settlement, and no recourse is had to arbitration, disputes shall be submitted for investigation to an International Commission of Inquiry, which is to report within a specified time. The parties agree not to resort to war until the report of the Commission is made.¹

§ 50*a*. Just as during the period 1789-1815, so again during the World War, all progress is endangered, and indeed the Law of Nations would in part seem to be non-existent. This war breaks out in consequence of the murder of the Austrian Archduke, Francis Ferdinand, at Serajevo on June 28, 1914. One month afterwards, on July 28, 1914, Austria-Hungary declares war on Serbia. On August 1, Germany declares war on Russia, and on August 3, against France. On August 4, German troops violate Belgian neutrality at Gemmenich, and Great Britain declares war on Germany. Thus opens the World War; Germany and Austria are joined by Turkey on October 30, 1914, and Bulgaria on October 11, 1915; the six Allied Powers—Great Britain, France, Russia, Belgium, Serbia, and Montenegro—are joined by Japan on August 23, 1914, Italy on May 23, 1915, the United States on April 6, 1917, and by a large number of smaller Powers. The full number of States which declare war on Germany, or break off diplomatic relations with her, during the World War, is twenty-seven.

Germany opens her maritime warfare by laying mines on the high seas, and her land warfare by violating the laws of war in Belgium. Her troops sack Louvain.

¹ See *A.J.*, ix. (1915), pp. 175 and 495. Such a treaty was concluded between Great Britain and the United

States on September 15, 1914, and ratified on November 10, 1914.

The
World
War:
1914-
1918.

She bombards undefended towns from the sea and from the air, and introduces the use of poison gas. These and countless other violations of International Law must be discussed in detail in the second volume of this work.

In the first month of the war Great Britain, France, and Russia declare their intention of putting in force, subject to certain modifications, the unratified Declaration of London; an attempt made by the United States of America, on August 7, to persuade both the Allied Powers and the Central Powers to adopt the *whole* declaration fails.¹ On December 28, 1914, the United States Government complains of British interference with American trade, and diplomatic correspondence between Great Britain, France, and the United States of America, with regard to the rights and duties of neutral Powers, continues until the United States declares war on Germany in 1917. This correspondence will also require attention in the second volume.

On November 5, 1914, Great Britain annexes Cyprus, and on December 18, 1914, declares a protectorate over Egypt.

Early in 1915, on February 4, Germany declares the waters round the British Isles to be a war zone, and proclaims that 'all enemy ships found in that area will be destroyed, and neutral vessels may be exposed to danger'; she proceeds to torpedo merchant ships at sight, and fires at hospital ships in daylight. This declaration initiates the correspondence between Germany and the United States regarding the conduct of maritime warfare, and other matters, which is continued until the United States declares war on Germany in 1917. On March 11, the British Government announces, in concert with its Allies, that, as a measure of retaliation, it will endeavour to prevent commodities of any kind from reaching or leaving Germany. On May 7, 1915, a

¹ A.J. (1915), Special Supplement, p. 7.

German submarine sinks by a torpedo the *Lusitania*, a British liner crowded with civilian passengers.¹

In the following year, on July 7, 1916, the British and French Governments make it known that they are no longer prepared to give effect to any part of the unratified Declaration of London, and 'must confine themselves simply to applying the historic and admitted rules of the Law of Nations.' During the winter of 1916, proposals of peace by the Central Powers are but the prelude to more desperate enterprises by Germany in the next year.

On January 31, 1917, Germany announces that she will stop all sea traffic, that of neutrals included, in the 'blockade zone' around Great Britain, France, and Italy, and in the Eastern Mediterranean. 'All ships met within that zone will be sunk.'² To this Great Britain replies, on February 16, with a new Order in Council, announcing further measures, by way of reprisals, designed to 'maintain the efficiency of those previously taken to prevent commodities of any kind from reaching or leaving the enemy countries.'³ The answer of the United States of America to the German challenge is the rupture of diplomatic relations on February 3, and a declaration of war on April 6. The development of 'unrestricted' submarine warfare also leads Great Britain, on March 10, 1917, to renew the attempts, previously made on August 8, 1914, and March 7, 1915, to induce Holland to admit defensively-armed merchantmen to Dutch ports, but again without success.⁴

In March 1917 revolution breaks out in Russia, followed by the abdication of the Czar Nicholas.

¹ *Parl. Papers*, Misc., No. 22 (1916), Cd. 8293.

² See memoranda enclosed in German Note to the United States of January 31, 1917, in *A.J.*, xi. (1917), Special Supplement, pp. 330-335.

³ *London Gazette*, February 21, 1917.

⁴ *Parl. Papers*, Misc., No. 14 (1917), Cd. 8690.

During this year the Allied Powers intervene in Greece. Greece had refused to regard the onslaught of Bulgaria upon Serbia in 1915 as a *casus foederis* under the Greco-Serbian alliance (see below, § 573), and, owing to the German associations of King Constantine, was adopting an attitude of 'benevolent neutrality' (see below, vol. ii. § 304) in favour of Germany. The Allied intervention results in the deposition of the King, and Greece declares war on Germany on June 29, 1917.¹

The heavy fighting round Ypres in the summer and autumn of this year leads to a controversy between the British and Dutch Governments, with regard to the transit through Holland of material for the construction of German concrete defences in Flanders, and for other warlike purposes.²

During the winter of 1917 the stress of the German submarine campaign drives the Dutch mercantile fleet into port; early in 1918, the Allied and Associated Powers, after abortive negotiations with Holland, requisition the Dutch shipping in their harbours.³

On March 3, 1918, Germany concludes a treaty of peace with the 'Bolshevik' Government of Russia at Brest Litovsk; and on May 7, Roumania, under pressure of invasion by the Central Powers, signs the Treaty of Bucharest.

In the spring of 1918, Germany begins that series of attacks which brings her close to Amiens and within range of Paris, and is to be her supreme effort. In the summer and autumn her armies are rolled back across Northern France, and disasters overtake her allies. In October she opens the negotiations which lead to the granting to her of an armistice by the Allied and Associated Powers on November 11, 1918. Bulgaria has

¹ See Ion in *A.J.*, xi. (1917), pp. 46-73, 327-357, and xii. (1918), pp. 312-337, 562-588, 796-812.

² See *Parl. Papers*, Misc., No. 17 (1917), Cd. 8693.

³ Misc., No. 11 (1918), Cd. 9025.

already secured an armistice on September 29, Turkey on October 30, and Austria on November 3.

50*b*. The Peace Conference formally opens on January 18,¹ 1919. The twenty-seven Allied and Associated Powers send plenipotentiaries, and the self-governing British Dominions and India are separately represented within the British Empire Delegation. No delegates are present on behalf of Germany or her allies. The first draft of the Covenant of the League of Nations is prepared by the middle of February, and is adopted, after revision, at the 5th Plenary Session of the Conference on April 28. The original intention to conclude preliminaries of peace with Germany, and then proceed to the details of the resettlement, is abandoned, and in May the definitive treaty is presented to the German plenipotentiaries, who have been summoned to Paris to receive it. After some modifications, the Treaty of Peace between the Allied and Associated Powers and Germany is signed at Versailles on June 28, 1919.² On the same day are signed two treaties—one between Great Britain and France, and the other between the United States and France—respecting assistance to France in the event of unprovoked aggression by Germany,³ an agreement between the British Empire, the United States of America, France, Belgium, and Germany, with regard to the military occupation of the territories of the Rhine (provided for in the Treaty of Peace with Germany),⁴ and a treaty between the Principal Allied and Associated Powers (the British Empire, the United States of America, France, Italy,

The
Peace
Con-
ference
after the
World
War :
1918-
1920.

¹ A valuable account of the Peace Conference at Paris during the year 1919 is contained in the New Year Supplement of *The Times*, January 1, 1920.

² Treaty Ser. No. 4 (1919), Cmd. 153. See below, § 568*e*. This treaty

is referred to in this book as 'the Treaty of Peace with Germany.'

³ Treaty Ser. No. 6 (1919), Cmd. 221. See below, § 569*b*, especially as to the coming into force of these Defence of France Treaties.

⁴ Treaty Ser. No. 7 (1919), Cmd. 222.

and Japan) and Poland, with regard to the protection of racial, religious, and linguistic minorities, commercial relations, and the accession of Poland to a number of general treaties.¹

The Conference now proceeds to complete the draft Treaty of Peace with Austria, which, as a result of the World War, has separated from Hungary. The terms are presented to the Austrian plenipotentiaries in July 1919, and, after modifications in the economic and financial clauses, the Treaty of Peace between the Allied and Associated Powers and Austria is signed at St. Germain on September 10, 1919.² Other important treaties signed on the same day are (1) two treaties between the Principal Allied and Associated Powers and Czecho-Slovakia³ and the Serb-Croat-Slovene State⁴ respectively, which contain provisions similar to those in the treaty with Poland above referred to; (2) a convention revising the General Act of Berlin of 1885 and the General Act and Declaration of Brussels of 1890;⁵ (3) a convention relating to the liquor traffic in Africa;⁶ and (4) a convention for the control of the trade in arms and ammunition.⁷

The Conference, having produced an International Air Convention which is signed on October 13,⁸ turns to Balkan problems and to the terms of peace for Bulgaria. Although the allocation of a large part of Thrace is left undetermined by it, the Treaty of Peace between the Allied and Associated Powers and Bulgaria is signed at Neuilly on November 27, 1919.⁹ On

¹ Treaty Ser. No. 8 (1919), Cmd. 223. See below, § 568*h*.

² Treaty Ser. No. 11 (1919), Cmd. 400. See below, § 568*f*. This treaty is referred to in this book as 'the Treaty of Peace with Austria.'

³ Treaty Ser. No. 20 (1919), Cmd. 479. See below, § 568*h*.

⁴ Treaty Ser. No. 17 (1919), Cmd. 461. See below, § 568*h*.

⁵ Treaty Ser. No. 18 (1919), Cmd. 477. See below, §§ 564 and 566.

⁶ Treaty Ser. No. 19 (1919), Cmd. 478. See below, § 566.

⁷ Treaty Ser. No. 12 (1919), Cmd. 414. See below, § 568*c*.

⁸ See below, § 568*b*.

⁹ Treaty Ser. No. 5 (1920), Cmd. 522. See below, § 568*g*. This treaty is referred to in this book as 'the Treaty of Peace with Bulgaria.'

December 10, Roumania signs a treaty with the Principal Allied and Associated Powers providing for the protection of minorities and commercial relations.¹ After the fall of the 'Bolshevik' *régime*, in consequence of the capture of Buda Pesth by Roumanian troops, terms of peace are presented to Hungary.

At the moment when this volume goes to press,² the Treaty of Peace with Germany has been ratified, and has come into force,³ between all the Principal Allied and Associated Powers (except the United States of America), a number of other Allied Powers, and Germany. The Treaties of Peace with Austria and Bulgaria have not yet come into force. The Treaties of Peace with Hungary and Turkey still await signature. The Turkish Treaty is to allocate Thrace, open the Bosphorus and the Dardanelles, and inaugurate a settlement of the Middle East. Outstanding, among other matters, are: the future of the territories formerly constituting the Russian Empire, the boundaries between Italy and the Serb-Croat-Slovene State, the allocation of Fiume, and the future of Albania and Montenegro.

§ 51. It is the task of history, not only to show how things have grown in the past, but also to extract a moral for the future out of the events of the past. Seven morals can be said to be deduced from the history of the development of the Law of Nations:

Seven
Lessons
of the
History
of the
Law of
Nations.

(1) The first and principal moral is that a Law of Nations can exist only if there be an equilibrium, a balance of power, between the members of the Family of Nations. If the Powers cannot keep one another in check, no rules of law will have any force, since an over-powerful State will naturally try to act according to discretion and disobey the law. As there is not, and never can be, a central political authority above the

¹ Treaty Ser. No. 6 (1920), Cmd. 588. See below, § 568h.

² May 1920.

³ On January 10, 1920.

sovereign States that could enforce the rules of the Law of Nations, a balance of power must prevent any member of the Family of Nations from becoming omnipotent. The history of the times of Louis XIV. and Napoleon I. shows clearly the soundness of this principle.¹

And this principle is particularly of importance in time of war. As long as only minor Powers, or a few of the Great Powers, are at war, the fear of the belligerents that neutral States might intervene can, and to a great extent does, prevent them from violating fundamental rules of International Law concerning warfare and the relations between belligerents and neutrals. But when, as during the World War, the Great Powers are divided into two camps which are at war, and the neutral States represent only a negligible body, there is no force which could restrain the belligerents, and compel them to conduct their warfare within the boundary lines of International Law. The existence of the League of Nations makes a balance of power not less, but all the more necessary, because an omnipotent State could disregard the League of Nations.

(2) The second moral is that International Law can develop progressively only when international politics, especially intervention, are made on the basis of real State interests. Dynastic wars belong to the past, as do interventions in favour of legitimacy. It is neither to be feared, nor to be hoped, that they should occur

¹ Attention ought to be drawn to the fact that, although the necessity of a balance of power is generally recognised, there are some writers of great authority who vigorously oppose this principle, as, for instance, Bulmerincq, *Praxis, Theorie und Codification des Völkerrechts* (1874), pp. 40-50. On the principle itself see Donnadieu, *Essai*

sur la Théorie de l'Équilibre (1900); Kaeber, *Die Idee des europäischen Gleichgewichts* (1907); Dupuis, *Le Principe d'Équilibre et le Concert européen* (1909); Hoijer, *La Théorie de l'Équilibre et le Droit des Gens* (1917); Ter Meulen, *Der Gedanke internationalen Organisation* (1917), pp. 38-60. See also below, § 136 n.

again in the future. But if they did, they would hamper the development of the Law of Nations in the future as they have done in the past.

(3) The third moral is that the progress of International Law is intimately connected with the victory everywhere of constitutional government over autocratic government, or, what is the same thing, of democracy over autocracy. Autocratic government, not being responsible to the nation it dominates, has a tendency to base the external policy of the State, just as much as its internal policy, on brute force and intrigue; whereas constitutional government cannot help basing both its external and its internal policy ultimately on the consent of the governed. And although it is not at all to be taken for granted that democracy will always and everywhere stand for international right and justice, so much is certain, that it excludes a policy of personal aggrandisement and insatiable territorial expansion, which in the past has been the cause of many wars.

(4) The fourth moral is that the principle of nationality is of such force that it is fruitless to try to stop its victory. Wherever a community of many millions of individuals, who are bound together by the same blood, language, and interests, become so powerful that they think it necessary to have a State of their own, in which they can live according to their own ideals, and can build up a national civilisation, they will certainly get that State sooner or later. What international politics can, and should do, is to enforce the rule that minorities of individuals of another race shall not be outside the law, but shall be treated on equal terms with the majority.¹ States embracing a population of several nationalities can exist and will always exist, as many examples show.

¹ See below, § 568*h*.

(5) The fifth moral is that every progress in the development of International Law wants due time to ripen. Although one must hope that the time will come when war will entirely disappear, there is no possibility of seeing this hope realised in our time. The first necessities of an eternal peace are that the surface of the earth should be shared between States of the same standard of civilisation, and that the moral ideas of the governing classes in all the States of the world should undergo such an alteration and progressive development as would create the conviction that arbitral awards and decisions of courts of justice are alone adequate means for the settlement of international differences. Eternal peace is an ideal, and in the very term 'ideal' is involved the conviction of the impossibility of its realisation in the present, although it is a duty to aim constantly at such realisation. The Permanent Court of Arbitration at the Hague, established by the Hague Peace Conference of 1899, is an institution that can bring us nearer to such realisation than ever could have been hoped. And codification of parts of the Law of Nations, following the codification of the rules regarding land warfare, will in due time arrive, and will make the legal basis of international intercourse firmer, broader, and more manifest than before.¹

(6) The sixth moral is that the progress of International Law depends to a great extent upon whether the legal school of international jurists prevails over the diplomatic school.² The legal school desires International Law to develop more or less on the lines of Municipal Law, aiming at the codification of firm, deci-

¹ See Oppenheim, *Die Zukunft des Völkerrechts* (1911), where some progressive steps are discussed which the future may realise.

² I name these schools 'diplomatic' and 'legal' for want of

better denomination. They must, however, not be confounded with the three schools of the 'Naturalists,' 'Positivists,' and 'Grotians,' details concerning which will be given below, §§ 55-57.

sive, and unequivocal rules of International Law, and working for the establishment of international courts for the purpose of the administration of international justice. The diplomatic school, on the other hand, considers International Law to be, and prefers it to remain, rather a body of elastic principles than of firm and precise rules. The diplomatic school opposes the establishment of international courts, because it considers diplomatic settlement of international disputes, and failing this arbitration, preferable to international administration of justice by international courts composed of permanently appointed judges. There is, however, no doubt that international courts are urgently needed, and that the rules of International Law require now an authoritative interpretation and administration such as only an international court can supply.

(7) The seventh, and last, moral is that the progressive development of International Law depends chiefly upon the standard of public morality on the one hand, and, on the other, upon economic interests. The higher the standard of public morality rises, the more will International Law progress. And the more important international economic interests grow, the more International Law will grow. For, looked upon from a certain standpoint, International Law is, just like Municipal Law, a product of moral and of economic factors, and at the same time the basis for a favourable development of moral and economic interests. This being an indisputable fact, it may, therefore, fearlessly be maintained that an immeasurable progress is guaranteed to International Law, since there are eternal moral and economic factors working in its favour.

III

THE SCIENCE OF THE LAW OF NATIONS

Phillimore, i. Preface to the first edition—Lawrence, §§ 22-29—Manning, pp. 21-65—Halleck, i. pp. 14, 18, 22, 25, 29, 34, 43—Walker, *History*, i. pp. 203-337, and *The Science of International Law* (1893), *passim*—Taylor, §§ 37-48—Wheaton, §§ 4-13—Hershey, Nos. 54-62 and 86—Rivier in *Holtzendorff*, i. pp. 395-523—Nys, i. pp. 224-351—Martens, i. §§ 34-38—Fiore, i. Nos. 53-88, 164-195, 240-272—Calvo, i. pp. 27-34, 45-46, 51-55, 61-63, 70-73, 101-137—Bonfils, Nos. 147-153—Despagnet, Nos. 28-35—Ullmann, § 18—Kaltenborn, *Die Vorläufer des Hugo Grotius* (1848)—Holland, *Studies*, pp. 1-58, 168-175—Westlake, *Papers*, pp. 23-77—Ward, *Enquiry into the Foundation and History of the Law of Nations*, 2 vols. (1795)—Reddie, *Enquiries in International Law*, 2nd ed., 1851, pp. 27-108—Nys, *Le Droit de la Guerre et les Précurseurs de Grotius* (1882), *Notes pour servir à l'Histoire... du Droit international en Angleterre* (1888), *Les Origines du Droit international* (1894), *Le Droit des Gens et les Anciens Jurisconsultes espagnols* (1914), and in *A.J.*, vi. (1912), pp. 1-279—Wheaton, *Histoire des Progrès du Droit des Gens en Europe* (1841)—Figgis, *From Gerson to Grotius* (1907)—Vanderpool, *Le Droit de Guerre d'après les Théologiens et les Canonistes du Moyen Age* (1911)—Focherini, *La Dottrina canonica del Diritto della Guerra da S. Agostino a Balihazar d'Ayala* (1912)—Oppenheim in *A.J.*, i. (1908), pp. 313-356—Pollock in *The Cambridge Modern History*, vol. xii. (1910), pp. 703-729—Nys in *R.I.*, 2nd Ser. xiv. (1912), pp. 360, 494, 614, and xvi. (1914), pp. 245-285—See also the bibliographies enumerated below in § 61.

Fore-
runners of
Grotius.

§ 52. The science of the modern Law of Nations commences from Grotius' work, *De Jure Belli ac Pacis, libri iii.*, because in it a fairly complete system¹ of International Law was for the first time built up as an independent branch of the science of law. But there were many writers before Grotius who wrote on special parts of the Law of Nations. They are therefore commonly called 'Forerunners of Grotius.' The most important of these forerunners are the following: (1) Legnano, Professor of Law in the University of Bologna, who wrote in 1360 his book, *De Bello, de Represaliis, et de Duello*, which was, however, not printed before 1477;²

¹ For a good analysis of the work of Grotius, see Walker, *History*, pp. 284-329.

² Newly edited in Scott's *Classics*

of *International Law*, by Holland, together with an English translation by Brierly (1917).

(2) Belli (1502-1575), an Italian jurist and statesman, who published in 1563 his book, *De Re militari et de Bello*; (3) Brunus (1491-1563), a German jurist, who published in 1548 his book, *De Legationibus*; (4) Victoria (1480-1546), professor in the University of Salamanca, whose *Relectiones theologicae*,¹ which partly deal with the Law of War, were published after his death in 1557; (5) Ayala (1548-1584), of Spanish descent but born in Antwerp, a military judge in the army of Alexandro Farnese, the Prince of Parma. He published in 1582 his book, *De Jure et Officiis bellicis et Disciplina militari*;² (6) Suarez (1548-1617), a Spanish Jesuit and professor at Coimbra, who published in 1612 his *Tractatus de Legibus ac Deo legislatore*, in which (ii. c. 19, n. 8) for the first time the attempt is made to found a law between the States on the fact that they form a community of States; (7) Gentilis (1552-1608), an Italian jurist, who became Professor of Civil Law in Oxford. He published in 1585 his work, *De Legationibus*, in 1588 and 1589 his *Commentationes de Jure Belli*, and in 1598 an enlarged work on the same matter under the title, *De Jure Belli, libri tres*.³ His *Advocatio Hispanica* was edited, after his death, in 1613 by his brother Scipio. Gentilis' book, *De Jure Belli*, supplies, as Professor Holland shows, the model and the framework of the first and third book of Grotius' *De Jure Belli ac Pacis*. 'The first step'—Holland rightly says—'towards making Inter-

¹ See details in Holland, *Studies*, pp. 51-52, and the analysis in Walker, *History*, pp. 215-229. The parts dealing with the Law of War, namely, *De Indis et de Jure Belli Relectiones*, were re-edited in 1917 by Nys in Scott's *Classics of International Law*, with an English translation by Bate.

² Newly edited in Scott's *Classics of International Law*, by Westlake, together with an English translation by Bate (1912). On

Ayala, see Nys in *R.I.*, 2nd Ser. xv. (1913), pp. 225-239.

³ Re-edited in 1877 by Holland. On Gentilis, see Holland, *Studies*, pp. 1-39; Westlake, *Papers*, pp. 33-36; Walker, *History*, i. pp. 249-277; Thamm, *Albericus Gentilis und seine Bedeutung für das Völkerrecht* (1896); Phillipson in the *Journal of the Society of Comparative Legislation*, New Ser. xii. (1912), pp. 52-80; Balch in *A.J.*, v. (1911), pp. 665-679; Abbot in *A.J.*, x. (1916), pp. 737-748.

national Law what it is was taken, not by Grotius, but by Gentilis.'

Grotius.

§ 53. Although Grotius owes much to Gentilis, he is nevertheless the greater of the two, and bears by right the title of 'Father of the Law of Nations.' Hugo Grotius¹ was born at Delft in Holland in 1583. He was from his earliest childhood known as a 'wondrous child' on account of his marvellous intellectual gifts and talents. He began to study law at Leyden when only eleven years old, and at the age of fifteen he took the degree of Doctor of Laws at Orleans in France. He acquired a reputation, not only as a jurist, but also as a Latin poet and a philologist. He first practised as a lawyer, but afterwards took to politics and became involved in political and religious quarrels which led to his arrest in 1618 and condemnation to prison for life. In 1621, however, he succeeded in escaping from prison, and went to live for ten years in France. In 1634 he entered into the service of Sweden and became Swedish Minister in Paris. He died in 1645 at Rostock in Germany on his way home from Sweden, whither he had gone to tender his resignation.

Even before he had the intention of writing a book on the Law of Nations, Grotius took an interest in matters international. For in 1609, when only twenty-four years old, he published—anonynously at first—a short treatise under the title *Mare liberum*, in which he contended that the open sea could not be the property of any State, whereas the contrary opinion was generally prevalent.² But it was not until fourteen years later that Grotius began, during his exile in France, to

¹ See Vreeland, *Hugo Grotius* (1917); and in *A.J.*, xi. (1917), pp. 580-606.

² See details with regard to the controversy concerning the freedom of the open sea below, §§ 248-250. Grotius' treatise, *Mare liberum*, is—

as we know now—the twelfth chapter of the work *De Jure Prædæ*, written in 1604, but never published by Grotius; it was not printed till 1868. See below, § 250. A new edition by J. B. Scott, together with an English translation by Magoffin, appeared in New York (1917).

write his *De Jure Belli ac Pacis, libri iii.*, which was published, after a further two years, in 1625, and of which it has rightly been maintained that no other book, with the single exception of the Bible, has ever exercised a similar influence upon human minds and matters. The whole development of the modern Law of Nations itself, as well as that of the science of the Law of Nations, takes root from this for ever famous book. Grotius' intention was originally to write a treatise on the Law of War, since the cruelties and lawlessness of warfare of his time incited him to the work. But thorough investigation into the matter led him further, and thus he produced a system of the Law of Nature and Nations. In the introduction he speaks of many of the authors before him, and he especially quotes Ayala and Gentilis. Yet, although he recognises their influence upon his work, he is nevertheless aware that his system is fundamentally different from those of his forerunners. There was in truth nothing original in Grotius' start from the Law of Nature for the purpose of deducing therefrom rules of a Law of Nations. Other writers before his time, and in particular Gentilis, had founded their works upon it. But nobody before him had done it in such a masterly way and with such a felicitous hand. And it is on this account that Grotius bears not only, as already mentioned, the title of 'Father of the Law of Nations,' but also that of 'Father of the Law of Nature.'

Grotius, as a child of his time, could not help starting from the Law of Nature, since his intention was to find such rules of a Law of Nations as were eternal, unchangeable, and independent of the special consent of the single States. Long before Grotius, the opinion was generally prevalent that above the positive law, which had grown up by custom or by legislation of a State, there was in existence another law which had its roots

in human reason, and which could therefore be discovered without any knowledge of positive law. This law of reason was called Law of Nature or Natural Law. But the system of the Law of Nature which Grotius built up, and from which he started when he commenced to build up the Law of Nations, became the most important and gained the greatest influence, so that Grotius appeared to posterity as the Father of the Law of Nature as well as that of the Law of Nations.¹

Whatever we may nowadays think of this Law of Nature, the fact remains unshaken that for more than two hundred years after Grotius, jurists, philosophers, and theologians firmly believed in it. And there is no doubt that, but for the systems of the Law of Nature and the doctrines of its prophets, the modern Constitutional Law and the modern Law of Nations would not be what they actually are. The Law of Nature supplied the crutches with whose help history has taught mankind to walk out of the institutions of the Middle Ages into those of modern times. The modern Law of Nations in particular owes its very existence² to the theory of the Law of Nature. Grotius did not deny that there already existed in his time a good many customary rules for the international conduct of the States, but he expressly kept them apart from those rules which he considered the outcome of the Law of Nature. He distinguishes, therefore, between the *Jus Gentium*, the customary Law of Nations—he calls it *Jus voluntarium*, *voluntary* Law—and the *Jus Naturae*, concerning the international relations of the States, afterwards called the *natural* Law of Nations. The bulk of Grotius' interest is concentrated upon the natural

¹ The 'new' Law of Nature—see Charmant, *La Renaissance du Droit naturel* (1910)—is something quite different from the Law of Nature taught by Grotius and his followers.

² See Pollock in the *Journal of the Society of Comparative Legislation*, New Ser. iii. (1901), p. 206.

Law of Nations, since he considered the voluntary of minor importance. But, nevertheless, he does not quite neglect the voluntary Law of Nations. Although he mainly and chiefly lays down the rules of the natural Law of Nations, he always mentions also voluntary rules concerning the different matters.

Grotius' influence was soon enormous, and reached over the whole of Europe. His book¹ went through more than forty-five editions, and many translations have been published.

§ 54. But the modern Law of Nations has another, Zouche. though minor, founder besides Grotius, and this is an Englishman, Richard Zouche² (1590-1660), Professor of Civil Law at Oxford, and a Judge of the Admiralty Court. A prolific writer, the book through which he acquired the title of 'Second founder of the Law of Nations,' appeared in 1650, and bears the title: *Juris et Judicii fecialis, sive Juris inter Gentes, et Quaestionum de eodem Explicatio, qua, quae ad Pacem et Bellum inter diversos Principes aut Populos spectant, ex Praecipuis historico Jure peritis exhibentur*.³ This little book has rightly been called the first manual of the *positive* Law of Nations. The standpoint of Zouche is totally different from that of Grotius, in so far as, according to him, the customary Law of Nations is the most important part of that law, although, as a child of his time, he does not at all deny the existence of a natural Law of Nations. It must be specially mentioned that Zouche was the first who used the term, *Jus inter Gentes*, for that new branch of law. Grotius knew very well, and says, that the Law of Nations is a law *between* the States, but he called it *Jus Gentium*, and it is due to his influence that until

¹ See Rivier in *Holtzendorff*, i. p. 412. The last English translation is that of 1854 by William Whewell.

² See Phillipson in the *Journal of the Society of Comparative Legis-*

lation, New Ser. ix. (1908), pp. 281-304.

³ Newly edited in Scott's *Classics of International Law*, by Holland, together with an English translation by Brierly (1911).

Bentham nobody called the Law of Nations *International Law*.

The distinction between the natural Law of Nations, chiefly treated by Grotius, and the customary or voluntary Law of Nations, chiefly treated by Zouche,¹ gave rise in the seventeenth and eighteenth centuries to three different schools ² of writers on the Law of Nations—namely, the ‘Naturalists,’ the ‘Positivists,’ and the ‘Grotians.’

The Naturalists.

§ 55. ‘Naturalists,’ or ‘Deniers of the Law of Nations,’ is the appellation of those writers who deny that there is any positive Law of Nations whatever as the outcome of custom or treaties, and who maintain that all Law of Nations is only a part of the Law of Nature. The leader of the Naturalists is Samuel Pufendorf³ (1632-1694), who occupied the first chair which was founded for the Law of Nature and Nations at a university—namely, that at Heidelberg. Among the many books written by Pufendorf, three are of importance for the science of International Law: (1) *Elementa Jurisprudentiæ universalis*, 1666; (2) *De Jure Naturæ et Gentium*, 1672; (3) *De Officio Hominis et Civis juxta Legem naturalem*, 1673. Starting from the assertion of Hobbes, *De Cive*, xiv. 4, that natural law is to be divided into natural law of individuals and of States, and that the latter is the Law of Nations, Pufendorf⁴ adds that outside this natural Law of Nations no

¹ It should be mentioned that already before Zouche, another Englishman, John Selden, in his *De Jure naturali et Gentium secundum Disciplinam Ebraeorum* (1640), recognised the importance of the positive Law of Nations. The successor of Zouche as a Judge of the Admiralty Court, Sir Leoline Jenkins (1625-1684) ought also to be mentioned. His opinions concerning questions of maritime law, and in particular prize law, were of the greatest importance for the develop-

ment of maritime International Law. See Wynne, *Life of Sir Leoline Jenkins*, 2 vols. (1740).

² These three schools of writers must not be confounded with the division of the present international jurists into the diplomatic and legal schools; see above, § 51, No. 6.

³ See Phillipson in the *Journal of the Society of Comparative Legislation*, New Ser. xii. (1912), pp. 233-265.

⁴ *De Jure Naturæ et Gentium*, ii. c. 3, § 22.

voluntary or positive Law of Nations exists which has the force of real law (*quod quidem legis proprie dictae vim habeat, quae gentes tamquam a superiore projecta stringat*).

The most celebrated follower of Pufendorf is the German philosopher Christian Thomasius (1655-1728), who published in 1688 his *Institutiones Jurisprudentiae*, and in 1705 his *Fundamenta Juris Naturae et Gentium*. Of English Naturalists may be mentioned Francis Hutcheson (*System of Moral Philosophy*, 1755), and Thomas Rutherford (*Institutes of Natural Law*; being the Substance of a Course of Lectures on Grotius, read in St. John's College, Cambridge, 2 vols. 1754-1756). Jean Barbeyrac (1674-1744), the learned French translator and commentator on the works of Grotius, Pufendorf, and others, and, further, Jean Jacques Burlamaqui (1694-1748), a native of Geneva, who wrote *Principes du Droit de la Nature et des Gens*, ought likewise to be mentioned.

§ 56. The 'Positivists' are the antipodes of the Naturalists. They include all those writers who, in contradistinction to Hobbes and Pufendorf, not only defend the existence of a positive Law of Nations as the outcome of custom or international treaties, but consider it more important than the natural Law of Nations, the very existence of which some of the Positivists deny, thus going beyond Zouche. The positive writers had not much influence in the seventeenth century, during which the Naturalists and the Grotians carried the day, but their time came in the eighteenth century.

The Positivists.

Of seventeenth-century writers, the Germans Rachel and Textor must be mentioned. Rachel published in 1676 his two dissertations, *De Jure Naturae et Gentium*,¹ in which he defines the Law of Nations as the law to

¹ Newly edited in Scott's *Classics of International Law*, by von Bar, together with an English translation by Bate (1916).

which a plurality of free States are subjected, and which comes into existence through tacit or express consent of these States (*Dissertatio altera*, § xvi., *Jus igitur gentium est jus plurium liberarum gentium pacto sive placito expressim aut tacite initum, quo utilitatis gratia sibi invicem obligantur*). Textor published in 1680 his *Synopsis Juris Gentium*.¹ According to him, the Law of Nations is founded on custom and express agreements.

In the eighteenth century the leading Positivists, Bynkershoek, Moser, and Martens, gained an enormous influence.

Cornelius van Bynkershoek² (1673-1743), a celebrated Dutch jurist, never wrote a treatise on the Law of Nations, but gained fame through three books dealing with different parts of this law. He published in 1702 *De Dominio Maris*, in 1721 *De Foro Legatorum*, in 1737 *Quaestionum Juris publici, libri ii.* According to Bynkershoek the basis of the Law of Nations is the common consent of the nations which finds its expression either in international custom or in international treaties.

Johann Jakob Moser (1701-1785), a German Professor of Law, published many books concerning the Law of Nations, of which three must be mentioned: (1) *Grundsätze des jetzt üblichen Völkerrechts in Friedenszeiten*, 1750; (2) *Grundsätze des jetzt üblichen Völkerrechts in Kriegszeiten*, 1752; (3) *Versuch des neuesten europäischen Völkerrechts in Friedens- und Kriegszeiten*, 1777-1780. Moser's books are magazines of an enormous number of facts which are of the greatest value for the positive Law of Nations. Moser never fights against the Naturalists, but he is totally indifferent towards the natural Law of Nations, since to him the Law of Nations

¹ Newly edited in Scott's *Classics of International Law*, by von Bar, together with an English translation by Bate (1916).

² See Phillipson in the *Journal of the Society of Comparative Legislation*, New Ser. ix. (1908), pp. 27-49.

is positive law only, and based on international custom and treaties.

Georg Friedrich von Martens (1756-1821), Professor of Law in the University of Göttingen, also published many books concerning the Law of Nations. The most important is his *Précis du Droit des Gens moderne de l'Europe*, published in 1789, of which William Cobbett published in 1795 at Philadelphia an English translation, and of which as late as 1864 appeared a new edition at Paris with notes by Charles Vergé. Martens began the celebrated collection of treaties which goes under the title, *Martens, Recueil de Traités*, and is continued to our days.¹ The influence of Martens was great, and even at the present time is considerable. He is not an exclusive Positivist, since he does not deny the existence of natural Law of Nations, and since he sometimes refers to the latter in case he finds a gap in the positive Law of Nations. But his interest is in the positive Law of Nations, which he builds up historically on international custom and treaties.

§ 57. The 'Grotians' stand midway between the Naturalists and the Positivists. They keep up the distinction of Grotius between the natural and the voluntary Law of Nations, but, in contradistinction to Grotius, they consider the positive or voluntary of equal importance to the natural, and they devote, therefore, their interest to both alike. Grotius' influence was so enormous that the majority of the authors of the seventeenth and eighteenth centuries were Grotians, but only two of them have acquired a European reputation—namely, Wolff and Vattel.

Christian Wolff (1679-1754), a German philosopher who was first Professor of Mathematics and Philosophy

¹ Georg Friedrich von Martens is not to be confounded with his nephew Charles de Martens, the

author of the *Causes célèbres du Droit des Gens* and of the *Guide diplomatique*.

in the Universities of Halle and Marburg and afterwards returned to Halle as Professor of the Law of Nature and Nations, was seventy years of age when, in 1749, he published his *Jus Gentium Methodo scientifica pertractatum*. In 1750 followed his *Institutiones Juris Naturae et Gentium*. Wolff's conception of the Law of Nations is influenced by his conception of the *Civitas Gentium maxima*. The fact that there is a Family of Nations in existence is strained by Wolff into the doctrine that the totality of the States form a world-State above the component member-States, the so-called *Civitas Gentium maxima*. He distinguishes four different kinds of Law of Nations—namely, the natural, the voluntary, the customary, and that which is expressly created by treaties. The latter two kinds are alterable, and have force only between those single States between which custom and treaties have created them. But the natural and the voluntary Law of Nations are both eternal, unchangeable, and universally binding upon all the States. In contradistinction to Grotius, who calls the customary Law of Nations 'voluntary,' Wolff names 'voluntary' those rules of the Law of Nations which are, according to his opinion, tacitly imposed by the *Civitas Gentium maxima*, the world-State, upon the member-States.

Emerich de Vattel¹ (1714-1767), a Swiss from Neuchâtel, who entered into the service of Saxony and became her Minister at Berne, did not in the main intend any original work, but undertook the task of introducing Wolff's teachings concerning the Law of Nations into the courts of Europe and to the diplomatists. He published in 1758 his work, *Le Droit des Gens, ou Principes de la Loi naturelle appliqués à la Conduite et aux Affaires des Nations et des Souverains*.² But it must be specially

² See Montmorency in the *Journal of the Society of Comparative Legislation*, New Ser. x. (1909), pp. 17-39.

¹ Newly edited in Scott's *Classics of International Law*, by Lapradelle, together with an English translation by Fenwick (1916).

mentioned that Vattel expressly rejects Wolff's conception of the *Civitas Gentium maxima* in the preface to his book. Numerous editions of Vattel's book have appeared, and as late as 1863 Pradier-Fodéré re-edited it at Paris. An English translation by Chitty appeared in 1834, and went through several editions. His influence was very great, and in diplomatic circles his book still enjoys an unshaken authority.

§ 58. Some details concerning the three schools of the Naturalists, Positivists, and Grotians were necessary, because these schools are still in existence. I do not, however, intend to give a list of writers on special subjects, and the following list of treatises comprises the more important ones only.

Treatises
of the
Nine-
teenth
and Twen-
tieth Cen-
turies.

(1) BRITISH TREATISES

William Oke Manning : Commentaries on the Law of Nations, 1839 ; new ed. by Sheldon Amos, 1875.

Archer Polson : Principles of the Law of Nations, 1848 ; 2nd ed. 1853.

Richard Wildman : Institutes of International Law, 2 vols. 1849-1850.

Sir Robert Phillimore : Commentaries upon International Law, 4 vols. 1854-1861 ; 3rd ed. 1879-1889.

Sir Travers Twiss : The Law of Nations, etc., 2 vols. 1861-1863 ; 2nd ed., vol. i. (Peace) 1884, vol. ii. (War) 1875 ; French translation, 1887-1889.

Sheldon Amos : Lectures on International Law, 1874.

Sir Edward Shepherd Creasy : First Platform of International Law, 1876.

William Edward Hall : A Treatise on International Law, 1880 ; 7th ed. 1917 (by Pearce Higgins).

Sir Henry Sumner Maine : International Law, 1883 ; 2nd ed. 1894 (Whewell lectures, not a treatise).

James Lorimer : The Institutes of the Law of Nations, 2 vols. 1883-1884 ; French translation by Nys, 1885.

Leone Levi : International Law, 1887.

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Henry Wheaton : Elements of International Law, 1836 ; 8th American ed. by Dana, 1866 ; 3rd English ed. by Boyd, 1889 ; 4th English ed. by Atlay, 1904 ; 5th English ed. by Coleman Phillipson, 1916.

Theodore D. Woolsey : Introduction to the Study of International Law, 1860 ; 6th ed. by Th. S. Woolsey, 1891.

Henry W. Halleck : International Law, 2 vols. 1861 ; 4th English ed. by Sir Sherston Baker, 1908.

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John N. Pomeroy : Lectures on International Law in Time of Peace, 1886.

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Hannis Taylor : A Treatise on International Public Law, 1901.

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(3) FRENCH TREATISES

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P. Pradier-Fodéré : Traité de Droit international public, 8 vols. 1885-1906.

- Alfred Chrétien* : Principes de Droit international public, 1893.
Henry Bonfils : Manuel de Droit international public, 1894 ;
 7th ed. by Fauchille, 1914.
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 6th ed. 1910.
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 4th ed. by De Boeck, 1910.
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Julius Schmelzing : Systematischer Grundriss des praktischen europäischen Völkerrechts, 3 vols. 1818-1820. Also Lehrbuch des europäischen Völkerrechts, 1821.
Johann Ludwig Klüber : Droit des Gens moderne, 1819 ; German ed. under the title of Europäisches Völkerrecht in 1821 ; last German ed. by Morstadt in 1851, and last French ed. by Ott in 1874.
Karl Heinrich Ludwig Poelitz : Practisches (europäisches), Völkerrecht, 1823 ; 2nd ed. 1828.
Friedrich Saalfeld : Handbuch des positiven Völkerrechts, 1833.
August Wilhelm Heffter : Das europäische Völkerrecht der Gegenwart, 1844 ; 8th ed. by Geffcken, 1888 ; French translations by Bergson in 1851 and Geffcken in 1883.
Heinrich Bernhard Oppenheim : System des Völkerrechts, 1845 ; 2nd ed. 1866.
Johann Caspar Bluntschli : Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt, 1868 ; 3rd ed. 1878 ; French translation by Lardy, 5th ed. 1895.
Adolph Hartmann : Institutionen des praktischen Völkerrechts in Friedenszeiten, 1874 ; 2nd ed. 1878.
Franz von Holtzendorff : Handbuch des Völkerrechts, 4 vols. 1885-1889. Holtzendorff is the editor and a contributor, but there are many other contributors.
August von Bulmerincq : Das Völkerrecht, 1887 ; 2nd ed. 1889.
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(5) ITALIAN TREATISES

- Ludovico Casanova* : Lezioni del Diritto internazionale, published after the death of the author by Cabella, 1853 ; 3rd ed., 2 vols., by Brusa, 1876.
- Pasquale Fiore* : Trattato di Diritto internazionale pubblico, 1865 ; 4th ed. in 3 vols. 1904 ; French translation of the 2nd ed. by Antoine, 1885.
- Giuseppe Carnazza-Amari* : Trattato sul Diritto internazionale di Pace, 2 vols. 1867-1875 ; French translation by Montanari-Revest, 1880-1882. Also Elementi di Diritto internazionale, 2 vols. 1866-1874.
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- Andrés Bello* : Principios de Derecho de Gentes (internacional), 1832 ; last ed. in 2 vols. by Silva, 1883 (Chilian).
- José Maria de Pando* : Elementos del Derecho internacional, published after the death of the author, 1843-1844 ; 2nd ed. 1852 (Peruvian).
- Antonio Riquelme* : Elementos de Derecho público internacional, etc. ; 2 vols. 1849.
- Carlos Calvo* : Le Droit international, etc. (first edition in Spanish, following editions in French), 1868 ; 5th ed. in 6 vols. 1896 (Argentinian).
- M. M. Madiedo* : Tratado de Derecho de Gentes, 1874 (Colombian).
- Amancio Alcorta* : Curso de Derecho internacional público, vol. i. 1887 ; French translation by Lehr, 1887 (Argentinian).
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público, 2 vols. 1887 ; 4th ed. in 4 vols. 1903-1904 ; 5th ed. (abridged), 1 vol. 1906.

José Augusto Moreira de Almeida : Elementos de Direito internacional publico, 1892.

Luis Gestoso y Acosta : Curso de Derecho internacional público, 1894 ; 2nd ed. 1898.

H. Feltner : Manual de Derecho internacional, 2 vols. 1894.

Miguel Cruchaga : Nociones de Derecho internacional, 1899 ; 2nd ed. 1902.

Manuel Torres Campos : Elementos de Derecho internacional público ; 3rd ed. 1912.

Clovis Bevilacqua : Direito publico internacional, 2 vols. 1911 (Brazilian).

S. Planas Suarez : Tratado de Derecho internacional publico, 2 vols. 1916 (Venezuelan, although published in Madrid).

(7) TREATISES OF AUTHORS OF OTHER NATIONALITIES

Frederick Kristian Bornemann : Forelaesninger over den positive Folkeret, 1866 (Danish).

Friedrich von Martens : Völkerrecht, 2 vols. 1883-1886 ; a German translation by Bergbohm of the Russian original. A French translation by Léo in 3 vols. appeared 1883-1887. The Russian original went through its 5th ed. in 1905.

Jan Helenus Ferguson : Manual of International Law, etc., 2 vols. 1884. The author is Dutch, but the work is written in English.

Alphonse Rivier : Lehrbuch des Völkerrechts, 1894 ; 2nd ed. 1899, and the larger work in two vols. under the title : Principes du Droit des Gens, 1896. The author of these two excellent books was a French Swiss, who taught International Law at the University of Brussels.

H. Matzen : Forelaesninger over den positive Folkeret, 1900 (Danish).

Ernest Nys : Le Droit international, 3 vols. 1904-1906 ; new edition 1912. The author of this exhaustive treatise is a Belgian jurist whose researches in the history of the science of the Law of Nations have gained him a far-reaching reputation.¹

¹ The first volume of Nys contains in its pp. 224-351 an exhaustive enumeration of all the more important works on International Law, treatises

as well as monographs, and I have much pleasure in referring my readers to this learned work.

J. De Louter : Het Stellig Volkenrecht, 2 vols. 1910.

M. Papoviliev : Mejdouderjeavuo Pravo (Law of Nations), vol. i. 1914. The author of this first Bulgarian treatise on International Law is professor in the University of Sofia.

The
Science of
the Law
of Nations
in the
Nine-
teenth
and Twen-
tieth Cen-
turies
as repre-
sented by
Treatises.

§ 59. The science of the Law of Nations, as left by the French Revolution, developed progressively during the nineteenth century under the influence of three factors. The first factor was the endeavour, on the whole sincere, of the Powers after the Congress of Vienna to submit to the rules of the Law of Nations. The second factor was the many law-making treaties which arose during this century. And the last, but not indeed the least factor, was the downfall of the theory of the Law of Nature, which after many hundreds of years was at last shaken off during the second half of this century.

When the nineteenth century opens, the three schools of the Naturalists, the Positivists, and the Grotians are still in the field, but Positivism¹ gains slowly and gradually the upper hand, until at the end it may be said to be victorious, without, however, being omnipotent. The most important writer² up to 1836 is Klüber, who may be called a Positivist in the same sense as Martens, for he also applies the natural Law of Nations to fill up the gaps of the positive. Wheaton appears in 1836 with his *Elements*, and, although an American, at once attracts the attention of the whole of Europe. He may be called a Grotian. And the same may be maintained of Manning, whose treatise appeared in 1839, and is the first that attempts a survey of British practice regarding sea warfare based on the

¹ Austin and his followers who hold that the rules of International Law are rules of 'positive morality' must be considered Positivists, although they do not agree to International Law being real law.

² I do not intend to discuss the merits of writers on special subjects, and I mention only the authors of the most important treatises which are written in, or translated into, English, French, or German.

judgments of Sir William Scott (Lord Stowell). Heffter, whose book appeared in 1844, is certainly a Positivist, although he does not absolutely deny the Law of Nature. In exact application of the juristic method, Heffter's book excels all former ones, and all the following authors are in a sense standing on his shoulders. In Phillimore, Great Britain sends in 1854 a powerful author into the arena, who may, on the whole, be called a Positivist of the same kind as Martens and Klüber. Generations to come will consult Phillimore's volumes on account of the vast amount of material they contain and the sound judgment they exhibit. And the same is valid with regard to Sir Travers Twiss, whose first volume appeared in 1861. Halleck's work, which appeared in the same year, is of special importance as regards war, because the author, who was a general in the service of the United States, gave to this part his special attention. The next prominent author, the Italian Fiore, who published his system in 1865 and may be called a Grotian, is certainly the most prominent Italian author, and the latest edition of his work will for a long time to come be consulted. Bluntschli, the celebrated Swiss-German author, published his book in 1868; it must, in spite of the world-wide fame of its author, be consulted with caution, because it contains many rules which are not yet recognised rules of the Law of Nations. Calvo's work, which first appeared in 1868, contains an invaluable store of facts and opinions, but its juristic basis is not very exact.

From the seventies of the nineteenth century the influence of the downfall of the theory of the Law of Nature becomes visible in the treatises on the Law of Nations, and therefore real 'positivistic' treatises make their appearance. For the Positivism of Zouche, Bynkershoek, Martens, Klüber, Heffter, Phillimore, and Twiss was no real Positivism, since these authors recog-

nised a natural Law of Nations, although they did not make much use of it. Real Positivism must entirely avoid a natural Law of Nations. We know nowadays that a Law of Nature does not exist. Just as the so-called natural philosophy had to give way to real natural science, so the Law of Nature had to give way to jurisprudence, or the philosophy of the positive law. Only a positive ¹ Law of Nations can be a branch of the science of law.

The first real positive treatise known to me is Hartmann's *Institutionen des praktischen Völkerrechts in Friedenszeiten*, which appeared in 1874, but is hardly known outside Germany. In 1880 Hall's treatise appeared, and at once won the attention of the whole world; it is one of the best books on the Law of Nations that have ever been written. Lorimer, whose two volumes appeared in 1883 and 1884, is a Naturalist pure and simple, but his work is nevertheless of value. The Russian Martens, whose two volumes appeared in German and French translations in 1883-1887, and at once put their author in the forefront of the authorities, certainly intends to be a real Positivist, but traces of natural law are nevertheless now and then to be found in his book. A work of a special kind is that of Holtzendorff, the first volume of which appeared in 1885. Holtzendorff himself is the editor and at the same time a contributor to the work, but there are many other contributors, each of them dealing exhaustively with a different part of the Law of Nations. The copious work of Pradier-Fodéré, which also began to appear in 1885, is far from being positive, although it has its merits. Wharton's three volumes, which appeared in 1886, are not a treatise, but contain the international practice of the United States. Bulmerincq's book,

¹ On the task and method of the science of International Law from the positive standpoint, see Oppenheim in *A.J.*, ii. (1908), pp. 313-356.

which appeared in 1887, gives a good survey of International Law from the positive point of view. In 1894 three French jurists, Bonfils, Despagnet, and Piédelièvre, step into the arena; their treatises are comprehensive and valuable, but not absolutely positive. On the other hand, the English authors, Lawrence and Walker, whose excellent manuals appeared in 1895, are real Positivists. Of the greatest value are the two volumes of Rivier which appeared in 1896; they are full of sound judgment, and will influence the theory and practice of International Law for a long time to come. Liszt's short manual, which in its first edition made its appearance in 1898, is positive throughout, well written, and suggestive. Ullmann's work, which likewise appeared in its first edition in 1898, is an excellent and comprehensive treatise which thoroughly discusses all the more important problems and points from the positive standpoint. Hannis Taylor's comprehensive treatise, which appeared in 1901, is likewise thoroughly positive, and so are the serviceable manuals of Wilson and Maxey. Of great value are the two volumes of Westlake, which appeared in 1904 and 1907; they represent rather a collection of thorough monographs than a treatise, and will have great and lasting influence. A work of particular importance is the *Digest* of John Bassett Moore, which appeared in 1906, comprises eight volumes, and contains the international practice of the United States in a much more exhaustive form than the work of Wharton; it is an invaluable work which must be consulted on every subject. The same is valid with regard to the three volumes of Nys, who may be characterised as a Grotian, and whose work is full of information on the historical and literary side of the problems. Mérignhac's work, the first part of which appeared in 1905, is a French treatise of value, but it is not yet completed. Diena's work, which first appeared

in 1908, is an excellent short Italian manual. Hershey's volume is thoroughly positive, and is very valuable on account of its notes, which survey the literature grown up around many controverted questions; it appeared in 1912. Stockton's *Outlines*, which appeared in 1914, is a thoroughly positive short treatise.

§ 60. COLLECTIONS OF TREATIES ¹

(1) GENERAL COLLECTIONS

Leibnitz : Codex Iuris Gentium diplomaticus (1693) ; Mantissa Codicis Iuris Gentium diplomatici (1700).

Bernard : Recueil des Traités, etc., 4 vols. (1700).

Rymer : Foedera etc. inter Reges Angliae et alios quosvis Imperatores . . . ab Anno 1101 ad nostra usque Tempora habita aut tractata, 20 vols. 1704-1718 (contains documents from 1101-1654).

Dumont : Corps universel diplomatique, etc., 8 vols. (1726-1731).

Rousset : Supplément au Corps universel diplomatique de Dumont, 5 vols. (1739).

Schmaruss : Corpus Iuris Gentium academicum (1730).

Wenck : Codex Iuris Gentium recentissimi, 3 vols. (1781, 1786, 1795).

Martens : Recueil de Traités d'Alliance, etc., 8 vols. (1791-1801) ; Nouveau Recueil de Traités d'Alliance, etc., 16 vols. (1817-1842) ; Nouveaux Supplémens au Recueil de Traités et d'autres Actes remarquables, etc., 3 vols. (1839-1842) ; Nouveau Recueil général de Traités, Conventions et autres Actes remarquables, etc., 20 vols. (1843-1875) ; Nouveau Recueil général de Traités et autres Actes relatifs aux Rapports de Droit international ; Deuxième Série, 35 vols. (1876-1908) ; Nouveau Recueil général de Traités et autres Actes relatifs aux Rapports de Droit international, Troisième Série, vol. i. 1909, continued up to date. Present editor, Heinrich Triepel, professor in the University of Berlin in Germany.

Ghillany : Diplomatisches Handbuch, 3 vols. (1855-1868).

Martens et Cussy : Recueil manuel, etc., 7 vols. (1846-1857) ; continuation by Geffcken, 3 vols. (1885-1888).

¹ Owing to the World War, some of the current collections of treaties are several volumes in arrear.

- British and Foreign State Papers (Hertslet) :** vol. i. 1841, continued up to date, one volume yearly.
- Das Staatsarchiv : Sammlung der officiellen Actenstücke zur Geschichte der Gegenwart,** vol. i. 1861, continued up to date, one volume yearly.
- Archives diplomatiques : Recueil mensuel de Diplomatie, d'histoire et de Droit international,** First and Second Series, 1861-1900, Third Series from 1901 continued up to date (4 vols. yearly).
- Recueil international des Traités du XIX^e Siècle :** Edited by Descamps, Renault, and Basdevant, vol. i. 1915 (more vols. are to appear).
- Recueil international des Traités du XX^e Siècle :** Edited by Descamps and Renault since 1902.
- Strupp :** Urkunden zur Geschichte des Völkerrechts, 2 vols. (1911)
- Albin :** Les grands Traités politiques depuis 1815 jusqu'à nos Jours. 2nd ed. 1912.

(2) COLLECTIONS OF ENGLISH TREATIES

- Jenkinson :** Collection of all the Treaties, etc., between Great Britain and other Powers from 1648 to 1783, 3 vols. (1785).
- Chalmers :** A Collection of Maritime Treaties of Great Britain and other Powers, 2 vols. (1790).
- Hertslet :** Collection of Treaties and Conventions between Great Britain and other Powers, so far as they relate to Commerce and Navigation, etc. (vol. i. 1820, continued to date).
- Treaty Series :** vol. i. 1892, and a volume every year.

(3) COLLECTIONS OF AMERICAN TREATIES

- Malloy :** Treaties, Conventions, International Acts, Protocols and Agreements between the United States and other Powers from 1776 to 1909.
- Calvo :** Recueil historique complet des Traités de tous les Etats de l'Amérique Latine depuis 1493 jusqu'à 1869. (There are also official collections of treaties of Argentina, Brazil, Colombia, Costa Rica, Guatemala, and Peru.)

(4) COLLECTIONS OF FRENCH AND SPANISH TREATIES

- De Clercq :** Recueil des Traités, etc., conclus par La France avec Puissances étrangères depuis 1713 jusqu'à 1904.
- Olivart :** Colección de Tratados de España desde el Reinado de Isabel II. hasta nuestros Dias (1911).

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Klüber : Droit des Gens moderne de l'Europe (Appendix) (1819).
Miruss : Das europäische Gesandtschaftsrecht, vol. ii. (1847).
Mohl : Geschichte und Literatur des Staatswissenschaften, vol. i. pp. 337-475 (1855).
Woolsey : Introduction to the Study of International Law (6th ed. 1891), Appendix I.
Rivier : pp. 393-523 of vol. i. of Holtzendorff's Handbuch des Völkerrechts (1885).
Stoerk : Die Litteratur des internationalen Rechts von 1884-1894 (1896).
Olivart : Catalogue d'une Bibliothèque de Droit international (1899).
Nys : Le Droit international, 2nd ed. vol. i. (1912), pp. 224-351.

Exhaustive current Bibliographies are supplied by each number of the American Journal of International Law.

§ 62. PERIODICALS ¹

- Revue de Droit international et de Législation comparée*. It has appeared in Brussels since 1869, one volume yearly. Present editor, Edouard Rolin.
- Revue générale de Droit international public*. It has appeared in Paris since 1894, one volume yearly. Founder and present editor, Paul Fauchille.
- Zeitschrift für internationale Recht*. It has appeared in Munich and Leipzig since 1891, one volume yearly. Present editor, Theodor Niemeyer.
- Annuaire de l'Institut de Droit international*, vol. i. 1877. A volume appears after each meeting of the Institute. The Institut Américain de Droit international also publishes a volume yearly since 1916.
- Kokusaiho-Zasshi*, the Japanese International Law Review. It has appeared in Tokio since 1903.
- Revista de Derecho internacional y Política exterior*. It has appeared in Madrid since 1905, one volume yearly. Editor, Marquis de Olivart.

¹ During the World War, some of the periodicals in enemy or occupied territory may have suspended publi-

cation, or changed editors. Details are not at present available.

Rivista di Diritto internazionale. It has appeared in Rome since 1906, one volume yearly. Editors, D. Anzilotti and A. Ricci-Busatti.

Zeitschrift für Völkerrecht. It has appeared in Breslau since 1906, one volume yearly. Editors, formerly Joseph Kohler and L. Oppenheim, but since 1915, Joseph Kohler and Max Fleischman.

The American Journal of International Law. It has appeared in Washington since 1907, one volume yearly. Editor, James Brown Scott. A Spanish edition has appeared since 1912.

Jahrbuch für Völkerrecht. It has appeared in Munich and Leipzig since 1913, one volume yearly. Editors, Th. Niemeyer and Karl Strupp.

La Vie internationale. It has appeared in Brussels since 1912, two volumes yearly. Editors, H. La Fontaine and Paul Otlet.

Journal du Droit international. In 1915 the scope of this journal of private International Law, founded in 1874 by Edouard Clunet, and still edited by him in Paris, was extended so as to cover public International Law.

Essays and Notes concerning International Law frequently appear also in the *Archiv für öffentliches Recht*, the *Law Quarterly Review*, the *Law Magazine and Review*,¹ the *Juridical Review*, the *Journal of the Society of Comparative Legislation* (now the *Journal of Comparative Legislation and International Law*), the *American Law Review*, the *Harvard Law Review*, the *Columbia Law Review*, the *Yale Law Review*, the *Annalen des deutschen Reiches*, the *Zeitschrift für das privat- und öffentliche Recht der Gegenwart* (Grünhut), the *Revue de Droit public et de la Science politique* (Larnaude), the *Annales des Sciences politiques*, the *Archivio giuridico*, the *Jahrbuch des öffentlichen Rechts*, the *Oesterreichische Zeitschrift für öffentliches Recht*, and many others.

¹ Not published since 1915.

PART I

THE SUBJECTS OF THE LAW OF NATIONS

CHAPTER I

INTERNATIONAL PERSONS

I

SOVEREIGN STATES AS INTERNATIONAL PERSONS

Vattel, i. §§ 1-12—Hall, § 1—Lawrence, § 37-43—Phillimore, i. §§ 61-68—Twiss, i. §§ 1-11—Taylor, § 117—Walker, § 1—Westlake, i. pp. 1-5, 20-22—Wheaton, §§ 16-21—Hershey, Nos. 87-95—Ullmann, § 19—Heffter, § 15—Holtzendorff in *Holtzendorff*, ii. pp. 5-11—Bonfils, Nos. 160-164—Despagnet, Nos. 69-74—Pradier-Fodéré, i. Nos. 43-81—Nys, i. pp. 352-382—Rivier, i. § 3—Calvo, i. §§ 39-41—Fiore, i. Nos. 305-309, and *Code*, Nos. 56-82—Martens, i. §§ 53-54—Mérignhac, i. pp. 114-232, and ii. pp. 5, 154-221—Moore, i. § 3.

§ 63. The conception of International Persons is derived from the conception of the Law of Nations. As this law is the body of rules which the civilised States consider legally binding in their intercourse, every State which belongs to the civilised States, and is, therefore, a member of the Family of Nations, is an International Person. And since now the Family of Nations has become an organised community under the name of the League of Nations with distinctive international rights and duties of its own, the League of Nations is an International Person *sui generis* besides the several States. But apart from the League of Nations, sovereign States exclusively are International Persons—*i.e.* subjects of International Law. There are, however, as will be seen, full and not-full sovereign States. Full sovereign States are perfect, not-full

Real and
apparent
International
Persons.

sovereign States are imperfect International Persons, for not-full sovereign States are for some parts only subjects of International Law.

In contradistinction to sovereign States which are real, there are also apparent, but not real, International Persons—such as Confederations of States, insurgents recognised as a belligerent Power in a civil war, and the Holy See. All these are not, as will be seen,¹ real subjects of International Law, but in some points are treated as though they were International Persons, without thereby becoming members of the Family of Nations. Nor do self-governing Dominions, such as Canada or Australia, bear the character of International Persons in consequence of the fact that they are for some points treated as though they were sovereign States, for instance, by being granted a vote of their own in the Universal Postal Union, or by being admitted as members of the League of Nations side by side with the mother country.²

It must be specially mentioned that the character of a subject of the Law of Nations and of an International Person can be attributed neither to monarchs, diplomatic envoys, private individuals, nor churches, nor to chartered companies, nor to organised wandering tribes.³ Nor is it admissible to distinguish⁴ between States as *normal*, and other political entities, as for instance the Roman Catholic Church, as *artificial* subjects of International Law.

Concept-
tion of the
State. § 64. A State proper—in contradistinction to colonies and Dominions²—is in existence when a people is

¹ See below, § 88 (Confederations of States), § 106 (Holy See), and vol. ii. §§ 59 and 76 (Insurgents).

² But see below, §§ 94 (a) and (b).

³ Most jurists agree with this opinion, but there are some who disagree. Thus, for instance, Heffter (§ 48) claims for monarchs the

character of subjects of the Law of Nations; Lawrence (§ 42) claims that character for corporations; and Westlake, *Papers*, p. 2, and Fiore, *Code*, Nos. 50, 60-69, claim it for individuals. The matter will be discussed below in §§ 288-290, 344, 384.

⁴ This is the opinion of Gidel in *R.G.*, xviii. (1911), p. 604.

settled in a country under its own sovereign Government. The conditions which must obtain for the existence of a State are therefore four :

There must, first, be a *people*. A people is an aggregate of individuals of both sexes who live together as a community in spite of the fact that they may belong to different races or creeds, or be of different colour.

There must, secondly, be a *country* in which the people has settled down. A wandering people, such as the Jews were whilst in the desert for forty years before their conquest of the Holy Land, is not a State. But it matters not whether the country is small or large ; it may consist, as in the case of city States, of one town only.

There must, thirdly, be a *Government*—that is, one or more persons who are the representatives of the people, and rule according to the law of the land. An anarchistic community is not a State.

There must, fourthly and lastly, be a *sovereign* Government. Sovereignty is supreme authority, an authority which is independent of any other earthly authority. Sovereignty in the strict and narrowest sense of the term implies, therefore, independence all round, within and without the borders of the country.

§ 65. A State in its normal appearance does possess independence all round, and therefore full sovereignty. Yet there are States in existence which certainly do not possess full sovereignty, and are therefore named not-full sovereign States. All States which are under the suzerainty or under the protectorate of another State, or are member-States of a so-called Federal State, belong to this group. All of them possess supreme authority and independence with regard to a part of the tasks of a State, whereas with regard to another part they are under the authority of another State. Hence it is that the question is disputed whether such

Not-full
Sovereign
States.

not-full sovereign States can be International Persons and subjects of the Law of Nations at all.¹

That they cannot be full, perfect, and normal subjects of International Law there is no doubt. But it is wrong to maintain that they can have no international position whatever, and can never be members of the Family of Nations at all. If we look at the matter as it really stands, we observe that they in fact often enjoy in many points the rights, and fulfil in other points the duties, of International Persons. They often send and receive diplomatic envoys, or at least consuls. They often conclude commercial or other international treaties. Their monarchs enjoy the privileges which, according to the Law of Nations, the Municipal Laws of the different States must grant to the monarchs of foreign States. No other explanation of these and similar facts can be given except that these not-full sovereign States are in some way or another International Persons and subjects of International Law. Such imperfect International Personality is, of course, an anomaly; but the very existence of States without full sovereignty is an anomaly in itself. And history teaches that States without full sovereignty have no durability, since they either gain in time full sovereignty or disappear totally as separate States, and become mere provinces of other States. So anomalous are these not-full sovereign States that no hard-and-fast general rule can be laid down with regard to their position within the Family of Nations, since everything depends upon the special case. What may be said in general concerning all the States without full sovereignty is that their position

¹ The question will be discussed again below, §§ 89, 91, 93, with regard to each kind of not-full sovereign States. The object of discussion here is the question whether such States can be con-

sidered as International Persons at all. Westlake, i. p. 21, answers it affirmatively by stating: 'It is not necessary for a State to be independent in order to be a State of International Law.'

within the Family of Nations, if any, is always more or less overshadowed by other States.

§ 66. The distinction between States full sovereign and not-full sovereign is based upon the opinion that sovereignty is divisible, so that the powers connected with sovereignty need not necessarily be united in one hand. But many jurists deny the divisibility of sovereignty, and maintain that a State is either sovereign or not. They deny that sovereignty is a characteristic of every State, and of the membership of the Family of Nations. It is therefore necessary to face the conception of sovereignty more closely. And it will be seen that there exists perhaps no conception, the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon.¹

§ 67. The term sovereignty was introduced into political science by Bodin in his celebrated work, *De la République*, which appeared in 1577. Before Bodin, at the end of the Middle Ages, the word *souverain*² was used in France for an authority, political or other, which had no other authority above itself. Thus the highest courts were called *Cours Souveraines*. Bodin, however, gave quite a new meaning to the old conception. Being under the influence of, and in favour of, the policy of centralisation initiated by Louis XI. of France (1461-1483), the founder of French absolutism, he defined sovereignty as 'the absolute and perpetual power within a State.'

Divisibility of Sovereignty contested

Meaning of Sovereignty the Sixteenth and Seventeenth Centuries

¹ The literature upon sovereignty is extensive. The following authors give a survey of the opinions of the different writers: — Landman, *Der Souveränitätsbegriff bei den französischen Theoretikern* (1896); Dock, *Der Souveränitätsbegriff von Bodin bis zu Friedrich dem Grossen* (1897);

Merriam, *History of the Theory of Sovereignty since Rousseau* (1900); Rehm, *Allgemeine Staatslehre* (1899), §§ 10-16. See also Maine, *Early Institutions*, pp. 342-400.

² *Souverain* is derived either from the Latin *superanus* or from *suprema potestas*.

According to Bodin, such power is the supreme power within a State without any restriction whatever except the Commandments of God and the Law of Nature. No constitution can limit sovereignty, which is an attribute of the king in a monarchy, and of the people in a democracy. A sovereign is above positive law. A contract is only binding upon the sovereign, because the Law of Nature commands that a contract shall be binding.¹

The conception of sovereignty thus introduced was at once accepted by writers on politics of the sixteenth century, but the majority of these writers taught that sovereignty could be restricted by a constitution and by positive law. Thus at once a somewhat weaker conception of sovereignty than that of Bodin made its appearance. On the other hand, in the seventeenth century, Hobbes went even beyond Bodin, maintaining² that a sovereign was not bound by anything, and had a right over everything, even over religion. Whereas a good many publicists followed Hobbes, others, especially Pufendorf, denied, in contradistinction to Hobbes, that sovereignty involves omnipotence. According to Pufendorf, sovereignty is the supreme power in a State, but not absolute power, and sovereignty may well be constitutionally restricted.³ Yet in spite of all the differences in defining sovereignty, all authors of the sixteenth and seventeenth centuries agree that sovereignty is indivisible, and contains the centralisation of all power in the hands of the sovereign, whether a monarch or the people itself in a republic. Yet the way for another conception of sovereignty is prepared by Locke, whose *Two Treatises on Government* appeared in 1689, and paved the way for the doctrine that the State itself

¹ See Bodin, *Dela République*, i. c. 8.

³ See Pufendorf, *De Jure Naturae*

² See Hobbes, *De Cive*, c. 6,
§§ 12-15.

et Gentium, vii. c. 6, §§ 1-13.

is the original sovereign, and that all supreme powers of the Government are derived from this sovereignty of the State.

§ 68. In the eighteenth century matters changed again. The fact that the several hundred reigning princes of the member-States of the German Empire had in practice, although not theoretically, become more or less independent since the Westphalian Peace enforced the necessity upon publicists of recognising a distinction between an absolute, perfect, full sovereignty, on the one hand, and, on the other, a relative, imperfect, not-full or half sovereignty. Absolute and full sovereignty was attributed to those monarchs who enjoyed an unqualified independence within and without their States. Relative and not-full sovereignty, or half sovereignty, was attributed to those monarchs who were, in various points of internal or foreign affairs of state, more or less dependent upon other monarchs. By this distinction the divisibility of sovereignty was recognised. And when in 1787 the United States of America turned from a Confederation of States into a Federal State, the division of sovereignty between the sovereign Federal State and the sovereign member-States appeared. But it cannot be maintained that divisibility of sovereignty was universally recognised in the eighteenth century. It suffices to mention Rousseau, whose *Contrat Social* appeared in 1762, and defended again the indivisibility of sovereignty. Rousseau's conception of sovereignty is essentially that of Hobbes, since it contains absolute supreme power, but differs in so far as, according to Rousseau, sovereignty belongs to the people only and exclusively, is inalienable, and therefore cannot be transferred from the people to any organ of the State.

Meaning
of Sove-
reignty
in the
Eigh-
teenth
Century.

§ 69. During the nineteenth century three different factors of great practical importance exercise their

Meaning of Sovereignty in the Nineteenth Century. influence on the history of the conception of sovereignty.

The first factor is that, with the exception of Russia, all civilised Christian monarchies during this period turn into constitutional monarchies. Thus identification in practice of sovereignty with absolutism belongs to the past, and the fact is during the nineteenth century generally recognised that a sovereign monarch may well be restricted in the exercise of his powers by a constitution and positive law.

The second factor is, that the example of a Federal State set by the United States is followed by Switzerland, Germany, and others. The Constitution of Switzerland (Art. I.) declares decidedly that the member-States of the Federal State remain sovereign States, thus indirectly recognising the divisibility of sovereignty between the member-States and the Federal State according to different matters.

The third and most important factor is, that the science of politics learns to distinguish between sovereignty of the State and sovereignty of the organ which exercises the powers of the State. The majority of publicists teach henceforth that neither the monarch, nor Parliament, nor the people is originally sovereign in a State, but the State itself. Sovereignty, we say nowadays, is a natural attribute of every State as a State. But a State, as a Juristic Person, wants organs to exercise its powers. The organ or organs which exercise for the State powers connected with sovereignty are said to be sovereign themselves; yet it is obvious that this sovereignty of the organ is derived from the sovereignty of the State. And it is likewise obvious that the sovereignty of a State may be exercised by the combined action of several organs, as, for instance, in Great Britain, King and Parliament are the joint administrators of the sovereignty of the State. And it is,

thirdly, obvious that a State can, as regards certain matters, have its sovereignty exercised by one organ, and as regards other matters by another organ.

In spite of this condition of things, the old controversy regarding divisibility of sovereignty has by no means died out. It acquired a fresh stimulus, on the one hand, through Switzerland and Germany turning into Federal States, and, on the other, through the conflict between the United States of America and her Southern member-States. The theory of the concurrent sovereignty of the Federal State and its member-States, as defended by *The Federalist* (Alexander Hamilton, James Madison, and John Jay) in 1787, was in Germany taken up by Waitz,¹ whom numerous publicists followed. The theory of the indivisibility of sovereignty was defended by Calhoun,² and many European publicists followed him in time.

§ 70. From the foregoing sketch of the history of the conception of sovereignty it becomes apparent that there is not, and never was, unanimity regarding this conception. It is therefore no wonder that the endeavour has been made to eliminate the conception of sovereignty from the science of politics altogether, and likewise to eliminate sovereignty as a necessary characteristic of statehood, so that States with and without sovereignty would in consequence be distinguishable. It is a fact that sovereignty is a term used without any well-recognised meaning except that of supreme authority. Under these circumstances those who do not want to interfere in a mere scholastic controversy must cling to the facts of life and the practical, though abnormal and illogical, condition of affairs. As there can be no doubt about the fact that there are semi-independent States in existence, it may well be maintained that sovereignty is divisible.

Result of
the Con-
troversy
regarding
Sove-
reignty.

¹ *Politik* (1862).

² *A Disquisition on Government* (1851).

II

RECOGNITION OF STATES AS INTERNATIONAL PERSONS

Hall, §§ 2 and 26—Lawrence, §§ 44-47—Phillimore, ii. §§ 10-22—Taylor, §§ 153-160—Walker, § 1—Westlake, i. pp. 49-58—Wheaton, § 27—Moore, i. §§ 27-75—Hershey, Nos. 110-123—Bluntschli, §§ 28-38—Hartmann, § 11—Heffter, § 23—Holtzendorff in *Holtzendorff*, ii. pp. 18-33—Liszt, § 5, iv.—Ullmann, §§ 29-30—Bonfils, Nos. 195-213—Despagnet, Nos. 79-85—Pradier-Fodéré, i. Nos. 136-145—Nys, i. pp. 73-120—Mérignhac, i. pp. 320-330—Rivier, i. pp. 57-61—Calvo, i. §§ 87-98—Fiore, i. Nos. 310-320, and *Code*, Nos. 165-182—Martens, i. §§ 63-64—Le Normand, *La Reconnaissance internationale et ses diverses Applications* (1899)—Borchard, § 85.

Recogni-
tion a Con-
dition of
Member-
ship of the
Family of
Nations.

§ 71. As the basis of the Law of Nations is the common consent of the civilised States, statehood alone does not imply membership of the Family of Nations. There are States in existence, although their number decreases gradually, which are not, or not fully, members of that family, because their civilisation, if any, does not enable them and their subjects to act in conformity with the principles of International Law. Those States which are members are either original members because the Law of Nations grew up gradually between them through custom and treaties, or they are members which have been recognised by the body of members already in existence when they were born.¹ For every State that is not already, but wants to be, a member, recognition is therefore necessary. A State is, and becomes, an International Person through recognition only and exclusively.

Many writers do not agree with this opinion. They maintain that, if a new civilised State comes into existence either by breaking off from an existing recognised State, as Belgium did in 1831, or otherwise, such new State enters of right into the Family of Nations and

¹ See above, §§ 27 and 28.

becomes of right an International Person.¹ They do not deny that in practice such recognition is necessary to enable every new State to enter into official intercourse with other States. Yet they assert that theoretically every new State becomes a member of the Family of Nations *ipso facto* by its rising into existence, and that recognition supplies only the necessary evidence for this fact.

If the real facts of international life are taken into consideration, this opinion cannot stand. It is a rule of International Law that no new State has a right as against other States to be recognised by them, and that no State has a duty to recognise a new State. It is generally agreed that a new State before its recognition cannot claim any right which a member of the Family of Nations has as against other members. It can, therefore, not be seen what the function of recognition could be, if a State entered at its birth really of right into the membership of the Family of Nations. There is no doubt that statehood itself is independent of recognition. International Law does not say that a State is not in existence as long as it is not recognised, but it takes no notice of it before its recognition. Through recognition only and exclusively a State becomes an International Person and a subject of International Law.

§ 72. Recognition is the act through which it becomes apparent that an old State is ready to deal with a new State as an International Person and a member of the Family of Nations. Recognition is given either expressly or implicitly. If a new State asks formally for recognition and receives it in a formal declaration of any kind, it receives express recognition. On the other hand, recognition is implicitly and indirectly given when

Mode of
Recogni-
tion.

¹ See, for instance, Hall, §§ 2 and 26; Ullmann, § 30; Gareis, p. 64;

Rivier, i. p. 57; Heilborn in *Stier-Somlo*, i. p. 58.

an old State enters officially into intercourse with the new, be it by sending or receiving a diplomatic envoy,¹ or by concluding a treaty, or by any other act through which it becomes apparent that the new State is actually treated as an International Person.

But no new State has by International Law a right to demand recognition, although in practice such recognition cannot in the long run be withheld, because without it there is no possibility of entering into intercourse with the new State. The interests of the old States must suffer quite as much as those of the new State, if recognition is for any length of time refused, and in practice these interests in time enforce either express or implicit recognition. History nevertheless records many cases of deferred recognition,² and, apart from other proof, it becomes thereby apparent that the granting or the denial of recognition is not a matter of International Law but of international policy.

It must be specially mentioned that recognition by one State is not at all binding upon other States, so that they must follow suit. But in practice such an example, if set by one or more Great Powers and at a time when the new State is really established on a sound basis, will make many other States at a later period give their recognition too.

Recogni-
tion under
Condi-
tions.

§ 73. Recognition will, as a rule, be given without any conditions whatever, provided the new State is safely and permanently established. Since, however, the granting of recognition is a matter of policy, and not of law, nothing prevents an old State from making the recognition of a new State dependent upon the latter fulfilling certain conditions. Thus the Powers assembled at the Berlin Congress in 1878 recognised

¹ Whether the sending of a consul involves recognition is discussed below, § 428.

² See the cases enumerated by Rivier, i. p. 58.

Bulgaria, Montenegro, Serbia, and Roumania under the condition only that these States should not ¹ impose any religious disabilities on any of their subjects.² The meaning of such conditional recognition is not that recognition can be withdrawn in case the condition is not complied with. The nature of the thing makes recognition, if once given, incapable of withdrawal. But conditional recognition, if accepted by the new State, imposes the internationally legal duty upon such State of complying with the condition ; failing which a right of intervention is given to the other party for the purpose of making the recognised State comply with the imposed condition.

§ 74. Recognition is of special importance in those cases where a new State tries to establish itself by breaking off from an existing State in the course of a revolution. And here the question is material whether a new State has really already safely and permanently established itself, or only makes efforts to this end without having already succeeded. That in every case of civil war a foreign State can recognise the insurgents ³ as a belligerent Power if they succeed in keeping a part of the country in their hands, set up a Government of their own, and conduct their military operations according to the laws of war there is no doubt. But between this recognition as a belligerent Power and the recognition of these insurgents and their part of the country as a new State, there is a broad and deep gulf. And the question is precisely at what exact time recognition of a new State may be given instead of the recognition as a belligerent Power. For an untimely and precipitate recognition as a new State is a violation of the dignity

Recognition
timely
and pre-
cipitate.

¹ This condition contains a restriction on the personal supremacy of the respective States. See below, § 128.

Treaty of Berlin of 1878, in Martens, *N.R.G.*, 2nd Ser. iii. p. 449.

³ The question of recognition of the belligerency of insurgents is exhaustively treated by Westlake, i. pp. 50-57.

² See Arts. 5, 27, 35, and 44 of the

of the mother-State, to which the latter need not patiently submit. It is frequently maintained that such untimely recognition comprises an intervention. But this is not correct, since intervention is (see below, § 134) *dictatorial* interference in the affairs of another State.

In spite of the importance of the question, no hard-and-fast rule can be laid down as regards the time when it can be said that a State created by revolution has established itself safely and permanently. Indication of such safe and permanent establishment may be found either in the fact that the revolutionary State has utterly defeated the mother-State, or that the mother-State has ceased to make efforts to subdue the revolutionary State, or even that the mother-State, in spite of its efforts, is apparently incapable of bringing the revolutionary back under its sway.¹ Of course, as soon as the mother-State itself recognises the new State, there is no reason for other States to withhold any longer their recognition, although they have even then no legal obligation to grant it.

The breaking-off of the American States from their European mother-States furnishes many illustrative examples. Thus the recognition of the United States by France in 1778 was precipitate. But when in 1782 England herself recognised the independence of the United States, other States could accord recognition too without giving offence to England. Again, when the South American colonies of Spain declared their independence in 1810, no Power recognised the new States for many years. When, however, it became apparent that Spain, although she still kept up her claims, was not able to restore her sway, the United

¹ When, in 1903, Panama fell away from Colombia, the United States immediately recognised the new Re-

public as an independent State. For the motives of this quick action, see Moore, iii. § 344, pp. 46 and following.

States recognised the new States in 1822, and England followed the example in 1824 and 1825.¹

§ 75. Recognition of a new State must not be con-
founded with other recognitions. Recognition of in-
surgents as a belligerent Power has already been men-
tioned. Besides this, recognition of a change in the
headship of a State,² or in the form of its Government,
or of a change in the title of an old State, are matters of
importance. But the granting or refusing of these
recognitions has nothing to do with recognition of the
State itself. If a foreign State refuses the recognition
of a new head, or of a change in the form of the Govern-
ment of an old State, the latter does not thereby lose
its recognition as an International Person, although
no official intercourse is henceforth possible between
the two States as long as recognition is not given either
expressly or tacitly. And if recognition of a new title ³
of an old State is refused, the only consequence is that
such State cannot claim any privileges connected with
the new title. However this may be, if a State has not
recognised insurgents in a foreign State as a belligerent
Power, or has not recognised the new head or a change
in the form of Government of a foreign State, the
courts ⁴ of the State refusing recognition cannot on
their own account grant such recognition, which is
purely a matter for their Government.

State
Recogni-
tion in
contradis-
tinction to
other
Recogni-
tions.

¹ See Gibbs, *Recognition: a Chapter from the History of the North American and South American States* (1863), and Moore, i. §§ 28-36.

² See below, § 342.

³ See below, § 119.

⁴ *Thompson v. Powles*, (1828) 2 Simons 194; *Kennett v. Chambers*, (1852) 14 Howard 38.

III

CHANGES IN THE CONDITION OF INTERNATIONAL
PERSONS

Grotius, ii. c. 9, §§ 5-13—Pufendorf, viii. c. 12—Vattel, i. § 11—Hall, § 2—Halleck, i. pp. 96-99—Phillimore, i. §§ 124-137—Taylor, § 163—Westlake, i. pp. 58-66—Wheaton, §§ 22-32—Hershey, Nos. 124-125—Moore, i. §§ 76-79—Bluntschli, §§ 39-53—Hartmann, §§ 12-13—Heffter, § 24—Holtzendorff in *Holtzendorff*, ii. pp. 21-23—Liszt, § 5—Ullmann, §§ 31 and 35—Bonfils, Nos. 214-215—Despagnet, Nos. 86-89—Pradier-Fodéré, i. Nos. 146-157—Nys, i. pp. 432-435—Rivier, i. § 3, pp. 62-67—Calvo, i. §§ 81-106—Fiore, i. Nos. 321-331, and *Code*, Nos. 124-146—Martens, i. §§ 65-69—Borchard, § 84.

Important in
contra-
distinction to
Indifferent
Changes.

§ 76. The existence of International Persons is exposed to the flow of things and times. There is a constant and gradual change in their citizens through deaths and births, emigration and immigration. There is a frequent change in those individuals who are at the head of the States, and there is sometimes a change in the form of their Governments, or in their dynasties if they are monarchies. There are sometimes changes in their territories through loss or increase of parts thereof, and there are sometimes changes regarding their independence through partial or total loss of the same. Several of these and other changes in the condition and appearance of International Persons are indifferent to International Law, although they may be of great importance for the inner development of the States concerned, and, directly or indirectly, for international policy. Those changes, on the other hand, which are, or may be, of importance to International Law must be divided into three groups according to their influence upon the character of the State concerned as an International Person. For some of these changes affect a State as an International Person,

others do not ; again, others extinguish a State as an International Person altogether.

§ 77. A State remains one and the same International Person in spite of changes in its headship, in its dynasty, in its form, in its rank and title, and in its territory. These changes cannot be said to be indifferent to International Law. Although strictly no notification to or recognition by foreign Powers is necessary, according to the Law of Nations, in case of a change in the headship of a State or in its entire dynasty, or if a monarchy becomes a republic or *vice versa*, no official intercourse is possible between the Powers refusing recognition and the State concerned. Although, further, a State can assume any title it likes, it cannot claim the privileges of rank connected with a title if foreign States refuse recognition. And although, thirdly, a State can dispose according to discretion of parts of its territory and acquire as much territory as it likes, foreign Powers may intervene for the purpose of maintaining a balance of power or on account of other vital interests.

Changes
not affect-
ing States
as Inter-
national
Persons.

But whatever may be the importance of such changes, they neither affect a State as an International Person, nor affect the personal identity of the States concerned.¹ France, for instance, has retained her personal identity from the time the Law of Nations came into existence until the present day, although she acquired, lost, and regained parts of her territory, changed her dynasty, was a kingdom, a republic, an empire, again a kingdom, again a republic, again an empire, and is now, finally as it seems, a republic. All her international rights and duties as an International Person remained the very same throughout the centuries in spite of these important changes in her condition and appearance. Even such

¹ For this reason a State is responsible for all acts committed by a former head which was recognised by a foreign State, although such

head may have attained its position through revolution. See the case of *The Republic of Peru v. Dreyfus Brothers*, (1888) 38 Ch. D. 348.

loss of territory as occasions the reduction of a Great Power to a small Power, or such increase of territory and strength as turns a small State into a Great Power, does not affect a State as an International Person. Thus, although through the events of the years 1859-1861 Sardinia acquired the whole territory of the Italian Peninsula and turned into the Great Power of Italy, she remained one and the same International Person.¹

Changes
affecting
States as
Inter-
national
Persons.

§ 78. Changes which affect States as International Persons are of different character.

(1) As in a Real Union the member-States of the union, although fully independent, make one International Person,² two States which hitherto were separate International Persons are affected in that character by entering into a Real Union. For through that change they appear henceforth together as one and the same International Person. And should this union be dissolved, the member-States are again affected, for they now become again separate International Persons.

(2) Other changes affecting States as International Persons are such changes as involve a partial loss of independence on the part of the States concerned. Many restrictions may be imposed upon States without interfering with their independence proper,³ but certain restrictions involve inevitably a partial loss of independence. Thus if a hitherto independent State comes under the suzerainty of another State and becomes thereby a half sovereign State, its character as an International Person is affected. The same is valid with regard to a hitherto independent State which comes under the protectorate of another State. Again, if several hitherto independent States enter into a Federal

¹ Another illustration is provided by the expansion of Serbia into the Serb-Croat-Slovene State after the World War.

² See below, § 87, where the char-

acter of the Real Union is fully discussed.

³ See below, §§ 126-127, where the different kinds of these restrictions are discussed.

State, they transfer a part of their sovereignty to the Federal State and become thereby part sovereign States. On the other hand, if a vassal State or a State under protectorate is freed from the suzerainty or protectorate, it is thereby affected as an International Person, because it turns now into a full sovereign State. And the same is valid with regard to a member-State of a Federal State which leaves the union and gains the condition of a full sovereign State.

(3) States which become permanently neutralised are thereby also affected in their character as International Persons, although their independence remains untouched. But permanent neutralisation alters the condition of a State so much that it thereby becomes an International Person of a particular kind.

§ 79. A State ceases to be an International Person when it ceases to exist. Theoretically such extinction of International Persons is possible through emigration or the perishing of the whole population of a State, or through permanent anarchy within a State. But it is evident that such cases will hardly ever occur in fact. Practical cases of extinction of States are: merger of one State into another, annexation after conquest in war, breaking up of a State into several States, and breaking up of a State into parts which are annexed by surrounding States.

By voluntarily merging into another State, a State loses all its independence and becomes a mere part of another. In this way the Duchy of Courland merged in 1795 into Russia, the two Principalities of Hohenzollern-Hechingen and Hohenzollern-Sigmaringen in 1850 into Prussia, the Congo Free State in 1908 into Belgium, and Korea in 1910 into Japan. And the same is the case if a State is subjugated by another. In this way the Orange Free State and the South African Republic were absorbed by Great Britain in 1901. An

Extinction
of International
Persons.

example of the breaking up of a State into different States is the division of the Swiss canton of Basel into Basel-Stadt and Basel-Land in 1833. And an example of the breaking up of a State into parts which are annexed by surrounding States, is the absorption of the old State of Poland by Russia, Austria, and Prussia in 1795.

IV

SUCCESSION OF INTERNATIONAL PERSONS ¹

Grotius, ii. c. 9 and 10—Pufendorf, viii. c. 12—Hall, §§ 27-29—Phillimore, i. § 137—Lawrence, § 49—Halleck, i. pp. 96-99—Taylor, §§ 164-168—Westlake, i. pp. 68-83, and *Papers*, pp. 475-497—Wharton, i. § 5—Moore, i. §§ 92-99—Hershey, Nos. 127-130—Wheaton, §§ 28-32—Bluntschli, §§ 47-59—Hartmann, § 12—Heffter, § 25—Holtzendorff in *Holtzendorff*, ii. pp. 33-43—Liszt, § 23—Ullmann, § 32—Bonfils, Nos. 216-233—Despagnet, Nos. 89-102—Pradier-Fodéré, i. Nos. 156-163—Nys, i. pp. 432-435—Rivier, i. § 3, pp. 69-75—Calvo, i. §§ 99-104—Fiore, i. Nos. 349-366—Martens, i. § 67—Appleton, *Des Effets des Annexions de Territoires sur les Dettes de l'État démembré ou annexé* (1895)—Huber, *Die Staatensuccession* (1898)—Keith, *The Theory of State Succession, with special reference to English and Colonial Law* (1907)—Cavaglieri, *La Dottrina della Successione di Stato a Stato*, etc. (1910)—Focherini, *Le Successioni degli Stati*, etc. (1910)—Schoenborn, *Staaten-sukzessionen* (1913)—Michel, *Die Einverleibung Frankforts in den preussischen Staat als Fall einer Staatensukzession* (1913)—Schmidt, *Der Uebergang der Staatsschulden bei Gebietsabtretungen* (1913)—Richards in the *Law Magazine and Review*, xxviii. (1903), pp. 129-141—Keith in *Z. V.*, iii. (1909), pp. 618-648—Hershey in *A. J.*, v. (1911), pp. 285-297—Borchard, § 83—Sayre in *A. J.*, xii. (1918), pp. 475-497, and 705-743—Phillipson, *Termination of War and Treaties of Peace* (1916), pp. 34-51, and 290-334.

§ 80. Although there is no unanimity among the writers on International Law with regard to the so-called succession of International Persons, nevertheless

¹ The following text treats only of the broad outlines of the subject, as the practice of the States has hardly settled more than general principles. Details must be studied in Huber, *Die Staatensuccession* (1898); Keith, *The*

Theory of State Succession, etc. (1907); and Schoenborn, *Staaten-sukzessionen*. Keith's analysis of cases in *Z. V.*, iii. (1909), pp. 618-648, is likewise very important.

the following common doctrine can be stated to exist.

Common
Doctrine
regarding
Succession of
Inter-
national
Persons.

A succession of International Persons occurs when one or more International Persons take the place of another International Person, in consequence of certain changes in the latter's condition.

Universal succession takes place when one International Person is absorbed by another, either through subjugation or through voluntary merger. And universal succession further takes place when a State breaks up into parts, which either become separate International Persons of their own or are annexed by surrounding International Persons.

Partial succession takes place, first, when a part of the territory of an International Person breaks off in a revolt and by winning its independence becomes itself an International Person; secondly, when one International Person acquires a part of the territory of another through cession; thirdly, when a hitherto full sovereign State loses part of its independence through entering into a Federal State, or coming under suzerainty or under a protectorate, or when a hitherto not-full sovereign State becomes full sovereign; fourthly, when an International Person becomes a member of a Real Union or *vice versa*.

Nobody ever maintained that on the successor devolve *all* the rights and duties of his predecessors. But after stating that a succession takes place, writers try to deduce the consequences and to make out what rights and duties do, and what do not, devolve.

Several writers,¹ however, contest the common doctrine, and maintain that a succession of International Persons never takes place. Their argument is that the rights and duties of an International Person disappear

¹ For instance, Gareis, pp. 66-70, who discusses the matter with great clearness; Cavaglieri, *op. cit.*; Foehnerini, *op. cit.*

with the extinguished Person, or become modified, according to the modifications an International Person undergoes through losing part of its sovereignty.

How far
Succession
actually
takes
place.

§ 81. If the real facts of life are taken into consideration, the common doctrine cannot be upheld. To say that succession takes place in such and such cases and to make out afterwards what rights and duties devolve, shows a wrong method of dealing with the problem. It is certain that no *general* succession takes place according to the Law of Nations. With the extinction of an International Person disappear its rights and duties as a person. But it is equally wrong to maintain that no succession whatever occurs. For nobody doubts that certain rights and duties actually and really devolve upon an International Person from its predecessor. And since this devolution takes place through the very fact of one International Person following another in the possession of State territory, there is no doubt that, as far as these devolving rights and duties are concerned, a succession of one International Person to the rights and duties of another really does take place. But no general rule can be laid down concerning all the cases in which a succession takes place. These cases must be discussed singly.¹

Succession in
consequence of
Absorption.

§ 82. When a State merges voluntarily into another State—as, for instance, Korea in 1910 did into Japan—or when a State is subjugated by another State, the latter remains one and the same International Person and the former becomes totally extinct as an International Person. No succession takes place, therefore, with regard to rights and duties of the extinct State arising either from the character of the latter as an International Person or from its purely political treaties.

¹ It is impossible in a general treatise on International Law to treat all the cases with all details. Readers must be referred to the

above-named works of Huber, Keith, and Schoenborn; but great care is necessary, since these writers are not at all unbiassed.

Thus treaties of alliance or of arbitration or of neutrality or of any other political nature fall to the ground with the extinction of the State which concluded them. They are personal treaties, and they naturally, legally, and necessarily presuppose the existence of the contracting State. But it is controversial whether treaties of commerce, extradition, and the like, made by the extinct State remain valid, so that a succession takes place. The majority of writers correctly, I think, answer the question in the negative, because such treaties, although they are non-political in a sense, possess some prominent political traits.¹

A real succession takes place, however, first, with regard to such international rights and duties of the extinct State as are locally connected with its land, rivers, main roads, railways, and the like. According to the principle *res transit cum suo onere*, treaties of the extinct State concerning boundary lines, repairing of main roads, navigation on rivers, and the like, remain valid, and all rights and duties arising from such treaties of the extinct State devolve on the absorbing State.

A real succession, secondly, takes place with regard to the fiscal property and the fiscal funds of the extinct State. They both accrue to the absorbing State *ipso facto* by the absorption of the extinct State.² But the

¹ On the whole question concerning the extinction of treaties in consequence of the absorption of a State by another, see Moore, v. § 773, and below, § 548. When, in 1910, Korea merged into Japan, the latter published a declaration—see Martens, *N.R.G.*, 3rd Ser. iv. p. 26—containing the following article with regard to the treaty obligations of the extinct State of Korea:—

1. Treaties hitherto concluded by Korea with foreign Powers ceasing to be operative, Japan's existing treaties will, so far as practicable, be applied to Korea. Foreigners resident in Korea will, so far as

conditions permit, enjoy the same rights and immunities as in Japan proper, and the protection of their legally acquired rights subject in all cases to the jurisdiction of Japan. The Imperial Government of Japan is ready to consent that the jurisdiction in respect of the cases actually pending in any foreign Consular Court in Korea at the time the Treaty of Annexation takes effect shall remain in such Court until final decision.

² This was recognised by the High Court of Justice in 1866 in the case of *The United States v. Prioleau*, 35 L.J. Ch. 7.

debts¹ of the extinct State must, on the other hand, also be taken over by the absorbing State.² The private creditor of an extinct State certainly acquires no right³ by International Law against the absorbing State, since the Law of Nations is a law between States only and exclusively. But if he is a foreigner, the right of protection possessed by his home State enables the latter to exercise pressure upon the absorbing State for the purpose of making it fulfil its international duty to take over the debts of the extinct State. Some jurists⁴ go so far as to maintain that the succeeding State must take over the debts of the extinct State, even when they are higher than the value of the accrued fiscal property and fiscal funds. But I doubt whether in such cases the practice of the States would follow that opinion. On the other hand, a State which has subjugated another would be compelled⁵ to take over even

¹ See Moore, i. § 97, and Appleton, *Des Effets des Annexions de Territoires sur les Dettes*, etc. (1895).

² This is almost generally recognised by writers on International Law and the practice of the States. (See Huber, *op. cit.*, pp. 156 and 282, note 449.) The Report of the Transvaal Concessions Commission (see *Parl. Papers*, South Africa, 1901, Cd. 623), although it declares (p. 7) that 'it is clear that a State which has annexed another is not legally bound by any contracts made by the State which has ceased to exist,' nevertheless agrees that 'the modern usage of nations has tended in the acknowledgment of such contracts.' It may, however, safely be maintained that not a usage, but a real rule of International Law, based on custom, is in existence with regard to this point. (See Hall, § 29, and Westlake in the *Law Quarterly Review*, xxvii. (1901), pp. 392-401, xxi. (1905), pp. 335-339, and Westlake, i. pp. 74-83.)

³ This is the real portent of the judgment in the case of *Cook v. Sprigg*, [1899] A.C. 572, and in the

case of *The West Rand Central Gold Mining Co. v. The King*, [1905] 2 K.B. 391. In so far as the latter judgment denies the existence of a rule of International Law that compels a subjugator to pay the debts of the subjugated State, its arguments are in no wise decisive. An international court would recognise such a rule.

⁴ See Martens, i. § 67; Heffter, § 25; Huber, *op. cit.*, p. 158.

⁵ See the Report of the Transvaal Concessions Commission, p. 9, which maintains the contrary. Westlake (i. p. 81) adopts the reasoning of this report, but his arguments are not decisive. The lending of money to a belligerent under ordinary mercantile conditions—see Barclay in the *Law Quarterly Review*, xxi. (1905), p. 307—is not prohibited by International Law, although the carriage of such funds in cash on neutral vessels to the enemy falls under the category of carriage of contraband, and can be punished by the belligerents. (See below, vol. ii. § 352.)

such obligations as have been incurred by the annexed State for the immediate purpose of the war which led to its subjugation.¹

The case of a Federal State arising—like the German Empire in 1871—above a number of several hitherto full sovereign States also presents, with regard to many points, a case of State succession.² However, no hard-and-fast rules can be laid down concerning it, since everything depends upon the question whether the Federal State is one which—like all those of America—totally absorbs all international relations of the member-States, or whether—like Switzerland—it absorbs these relations to a greater extent only.³

§ 83. When a State breaks up into fragments which themselves become States and International Persons, or which are annexed by surrounding States, it becomes extinct as an International Person, and the same rules are valid as regards the case of absorption of one State by another. A difficulty is, however, created when the territory of the extinct State is absorbed by several States. Succession actually takes place here too, first, with regard to the international rights and duties locally connected with those parts of the territory which the respective States have absorbed. Succession takes place, secondly, with regard to the fiscal property and the fiscal funds which each of the several absorbing States finds on the part of the territory it absorbs. And the debts of the extinct State must be taken over. But the case is complicated through the fact that there are several successors to the fiscal property and funds, and

Succession in consequence of Dismemberment.

¹ The question how far concessions granted by a subjugated State to a private individual or to a company must be upheld by the subjugating State, is difficult to answer in its generality. The merits of each case would seem to have to be taken into consideration. See Westlake, i. p.

82; Moore, i. § 98; Gidel, *Des Effets de l'Annexion sur les Concessions* (1904).

² See Huber, *op. cit.*, pp. 163-170; Keith, *op. cit.*, pp. 92-98; and Schoenborn, *op. cit.*, §§ 8 and 9.

³ See below, § 89.

the only rule which can be laid down is that proportionate parts of the debts must be taken over by the different successors. In the complicated case of the dismemberment of Austria-Hungary in 1918, when the Real Union—see below, § 87—was dissolved, and the old State broke up into fragments, some of which became themselves States and International Persons, while others were annexed by surrounding States, the Treaties of Peace made express provision for the apportionment between the States concerned of the pre-war debt of Austria-Hungary, and defined the extent of the liability of Austria for the debt incurred by the dismembered Dual Monarchy in prosecuting the war. Thus the Treaty of Peace with Austria provides (Article 203) that each of the States to which territory of the former Austro-Hungarian monarchy is transferred, and each of the States arising from the dismemberment of that monarchy, including Austria, shall assume responsibility for a portion of the secured and unsecured bonded debt of the former Austro-Hungarian Government, as it stood before the outbreak of war. Machinery is provided for ascertaining that portion which each State is to assume. None of these States, other than Austria, are to bear any responsibility for the bonded *war* debt of the former Austro-Hungarian Government; but, on the other hand, they are to have no recourse against Austria in respect of war debt bonds which they or their nationals hold (Article 205).

When—as in the case of Sweden-Norway in 1905—a Real Union¹ is dissolved and the members become separate International Persons, a succession likewise takes place. All treaties concluded by the Union devolve upon the former members, except those which were concluded by the Union for one member only—*e.g.* by Sweden-Norway for Norway—and which, there-

¹ See below, § 87.

fore, devolve upon that former member only, and, further, except those which concerned the Union itself and lose all meaning by its dissolution.¹

§ 84. When in consequence of war or otherwise one State cedes a part of its territory to another, or when a part of the territory of a State breaks off, and becomes a State and an International Person itself, succession takes place with regard to such international rights and duties of the predecessor as are locally connected with the part of the territory ceded or broken off, and with regard to the fiscal property² found on that part of the territory. It would only be just if the successor had to take over a corresponding part of the debt of its predecessor, but no rule of International Law concerning this point can be said to exist, although many treaties have stipulated a devolution of a part of the debt of the predecessor upon the successor.³

Thus, for instance, Arts. 9, 33, 42 of the Treaty of Berlin⁴ of 1878 stipulated that Bulgaria, Montenegro, and Serbia should take over part of the Turkish debt. Again, the Peace Treaty of Lausanne of 1912, by which Italy acquired Tripoli, stipulated that Italy should take over a part of the Turkish debt.⁵ Likewise the Treaty of Peace with Germany provides that the Powers to which German territory is ceded shall assume responsibility for a portion of the pre-war debt

¹ The dismemberment of Austria-Hungary in 1918 involved, among other things, the dissolution of the Real Union between Austria and Hungary. The extent to which the treaties concluded by the Union devolved upon Austria and Hungary respectively is, so far at any rate as the Allied and Associated Powers are concerned, provided for by the Treaties of Peace. See below, § 568f, § 581b, and vol. ii. § 99.

² Thus in the case of *The United States v. Percheman*, (1833) 7 Peters 51, it was recognised that a grant of land in a ceded province, made to

an individual by the Government before the cession, must be carried out after the cession by the succeeding Government.

³ Many writers, however, maintain that there is such a rule of International Law. See Huber, *op. cit.*, Nos. 125-135 and 205, where the treaties concerned are enumerated. See also Schmidt, *Der Uebergang des Staatsschulden bei Gebietsabtretungen* (1913).

⁴ See Martens, *N.R.G.*, 2nd Ser. iii. p. 449.

⁵ Martens, *N.R.G.*, 3rd Ser. vii. p. 7.

of the German Empire, and also of the pre-war debt of the German State to which the ceded territory belonged. Arrangements are made for determining the portion which each State is to assume (Article 254). As, however, Germany in 1871 refused to undertake any part of the French debt, France is exempted by the Treaty of Peace from assuming any part of the German debt on account of the cession of Alsace-Lorraine (Article 255); and in the case of Poland, that part of the German debt which is attributable to measures for the German colonisation of Poland is to be excluded from the apportionment (Article 255).

On the other hand, the United States refused, after the cession of Cuba in 1898, to take over from Spain the so-called Cuban debt—that is, the debt which was settled by Spain on Cuba before the war.¹ Spain argued that it was not intended to transfer to the United States a proportional part of the debt of Spain, but only such debt as attached individually to the island of Cuba. The United States, however, met this argument by the correct assertion that the debt concerned was not incurred by Cuba, but by Spain, and settled by her on Cuba.

V

COMPOSITE INTERNATIONAL PERSONS

Pufendorf, vii. c. 5—Hall, § 4—Westlake, i. pp. 31-37—Phillimore, i. §§ 71-74, 102-121—Twiss, i. §§ 37-60—Halleck, i. pp. 75-79—Taylor, §§ 120-130—Wheaton, §§ 39-59—Moore, i. §§ 6-11—Hershey, Nos. 96-102—Hartmann, § 10—Heffter, §§ 20-21—Holtzendorff in *Holtzendorff*, ii. pp. 118-149—Liszt, § 6—Ullmann, §§ 20-24—Bonfils, Nos. 165-174—Despagnet, Nos. 109-126—Pradier-Fodéré, i. Nos. 117-124—Mérignhac, ii. pp. 6-42—Nys, i. pp. 392-409—Rivier, i. §§ 5-6—Calvo, i. §§ 44-61—Fiore, i. Nos. 335-339, and *Code*, Nos. 101-109—Martens, i. §§ 56-59—

¹ See Moore, i. § 97, pp. 351-385.

Pufendorf, *De Systematibus Civitatum* (1675)—Jellinek, *Die Lehre von den Staatenverbindungen* (1882)—Borel, *Étude sur la Souveraineté de l'État fédératif* (1886)—Brie, *Theorie der Staatenverbindungen* (1886)—Hart, *Introduction to the Study of Federal Government in Harvard Historical Monographs* (1891) (includes an excellent bibliography)—Le Fur, *État fédéral et Confédération d'États* (1896)—Moll, *Der Bundestaatsbegriff in den Vereinigten Staaten von America* (1905)—Ebers, *Die Lehre von dem Staatenbunde* (1910).

§ 85. International Persons are as a rule single sovereign States. In such single States there is one central political authority as Government, which represents the State, within its borders as well as without, in its international intercourse with other International Persons. Such single States may be called *simple* International Persons. And a State may remain a simple International Person, although it may grant so much internal independence to outlying parts of its territory that these parts become in a sense States themselves. Great Britain is,¹ or at any rate was before the World War, a simple International Person, although the Dominion of Canada, Newfoundland, the Commonwealth of Australia, New Zealand, and the Union of South Africa were States, because Great Britain was alone sovereign and represented exclusively the British Empire within the Family of Nations.

Real and
apparent
Composite
International
Persons.

Historical events, however, have created, in addition to the simple International Persons, *composite* International Persons. A composite International Person is in existence when two or more sovereign States are linked together in such a way that they take up their position within the Family of Nations either exclusively, or at least to a great extent, as one single International Person. History has produced two different kinds of such composite International Persons—namely, Real Unions and Federal States. In contradistinction to Real Unions and Federal States, a so-called Personal

¹ See, however, below, § 94b.

Union and a union of so-called Confederated States are not International Persons.¹

States in
Personal
Union.

§ 86. A Personal Union is in existence when two sovereign States and separate International Persons are linked together through the accidental fact that they have the same individual as monarch. Thus a Personal Union existed from 1714 to 1837 between Great Britain and Hanover, from 1815 to 1890 between the Netherlands and Luxemburg, and from 1885 to 1908 between Belgium and the former Congo Free State. At present there is no Personal Union in existence. A Personal Union is not, and is in no point treated as though it were, an International Person, and its two sovereign member-States remain separate International Persons. Theoretically it is even possible for them to make war against each other, although in practice this will never occur. If, as sometimes happens, they are represented by one and the same individual as diplomatic envoy, such individual is the envoy of both States at the same time, but not the envoy of the Personal Union.

States in
Real
Union.

§ 87. A Real Union² is in existence when two sovereign States are, by an international treaty, recognised by other Powers, linked together for ever under the same monarch, so that they make one and the same International Person. A Real Union is not itself a State, but merely a union of two full sovereign States which together make one single but composite International Person. They form a compound Power, and are by the treaty of union prevented from making war

¹ I cannot agree with Westlake (i. p. 37) that 'the space which some writers devote to the distinctions between the different kinds of union between States' is 'disproportioned . . . to their international importance.' Very important questions are connected with these distinctions. The question, for instance, whether a diplomatic envoy sent by

Bavaria to this country must be granted the privileges due to a foreign diplomatic envoy depends upon the question whether Bavaria is an International Person in spite of her being a member-State of the German Empire.

² See Blüthgen in *Z. V.*, i. (1907), pp. 237-263.

against each other. On the other hand, they cannot make war separately against a foreign Power, nor can war be made against one of them separately. They can enter into separate treaties of commerce, extradition, and the like, but it is always the Union which concludes such treaties for the separate States, as separately they are not International Persons. At present there is no Real Union in existence,¹ that of Sweden-Norway having been dissolved in 1905, and that of Austria-Hungary having come to an end by the collapse of the Austro-Hungarian Empire in 1918, just before the close of the World War.

Austria-Hungary became a Real Union in 1723. In 1849 Hungary was united with Austria, but in 1867 Hungary became again a separate sovereign State, and the Real Union was re-established. Their army, navy, and foreign ministry were united. The Emperor-King could declare war, make peace, conclude alliances and other treaties, and send and receive the same diplomatic envoys for both States. With the downfall of the Austro-Hungarian Empire in 1918, the Union came to an end.

Sweden-Norway² became a Real Union³ in 1814. The King could declare war, make peace, conclude alliances and other treaties, and send and receive the same diplomatic envoys for both States. The Foreign Secretary of Sweden managed at the same time the foreign affairs of Norway. Both States had, however, in spite of the fact that they made one and the same International Person, different commercial and naval flags. The Union was peacefully dissolved by the Treaty of Stockholm (Karlstad) of October 26, 1905. Norway became

¹ As regards Denmark-Iceland, which is seemingly, but not in fact, a Real Union, see below, § 93.

² See Aall and Gjelsvik, *Die Norwegisch-Schwedische Union* (1912).

³ This is not universally recognised. Phillimore, i. § 74, maintains that there was a Personal Union between Sweden and Norway, and Twiss, i. § 40, calls it a Federal Union.

a separate kingdom, the independence and integrity of which was guaranteed by Great Britain, France, Germany, and Russia by the Treaty of Christiania of November 2, 1907.¹

Confederated States
(*Staatenbund*).

§ 88. Confederated States (*Staatenbund*) are a number of full sovereign States linked together for the maintenance of their external and internal independence by a recognised international treaty into a union with organs of its own, which are vested with a certain power over the member-States, but not over the citizens of these States. Such a union of Confederated States is not any more itself a State than a Real Union is; it is merely an International Confederation of States, a society of an international character, since the member-States remain full sovereign States and separate International Persons. Consequently, a union of Confederated States is not an International Person, although it is for some purposes so treated on account of its representing the compound power of the full sovereign member-States. The chief and sometimes the only organ of the union is a Diet, where the member-States are represented by diplomatic envoys. The power vested in the Diet is an international power which does not in the least affect the full sovereignty of the member-States. That power is essentially nothing else than the right of the body of the members to make war against such a member as will not submit to those commands of the Diet which are in accordance with the Treaty of Confederation, war between the member-States being prohibited² in all other cases.

History has shown that Confederated States represent an organisation which in the long run gives very

¹ See above, § 50.

² The fact that war between the member-States of the League of Nations is, under certain circum-

stances, not prohibited, is sufficient to show that the League of Nations is not a *Staatenbund*—a union of Confederated States described in the text.

little satisfaction. It is for that reason that the three important unions of Confederate States of modern times—namely, the United States of America, the German, and the Swiss Confederation—turned into unions of Federal States. Notable historic Confederations are those of the Netherlands from 1580 to 1795, the United States of America from 1778 to 1787, Germany from 1815 to 1866, Switzerland from 1291 to 1798 and from 1815 to 1848, and the Confederation of the Rhine (*Rheinbund*) from 1806 to 1813. At present there is no union of Confederate States. The last in existence, the major Republic of Central America,¹ which comprised the three full sovereign States of Honduras, Nicaragua, and San Salvador, and was established in 1895, came to an end in 1898.

§ 89. A Federal State² is a perpetual union of several sovereign States which has organs of its own and is invested with power, not only over the member-States, but also over their citizens. The union is based, first, on an international treaty of the member-States, and, secondly, on a subsequently accepted constitution of the Federal State. A Federal State is said to be a real State side by side with its member-States, because its organs have a direct power over the citizens of those member-States. This power was established by American³

Federal
States
(*Bundes-
staaten*).

¹ See Martens, *N.R.G.*, 2nd Ser. xxxii. pp. 276-292.

² The distinction between Confederate States and a Federal State is not at all universally recognised, and the terminology is consequently not at all the same with all writers on International Law.

³ When in 1787 the draft of the new Constitution of the United States, which had hitherto been Confederate States only, was under consideration by the Congress at Philadelphia, three members of the Congress—namely, Alexander Hamilton, James Madison, and John Jay—made up their minds to write

newspaper articles on the draft Constitution with the intention of enlightening the nation which had to vote for the draft. For this purpose they divided the different points among themselves and treated them separately. All these articles, which were not signed with the names of their authors, appeared under the common title, *The Federalist*. They were later on collected into book-form and have been edited several times. It is especially Nos. 15 and 16 of *The Federalist* which establish the difference between Confederate States and a Federal State in the way mentioned in the text above.

jurists of the eighteenth century as a characteristic distinction between a Federal State and Confederated States, and Kent as well as Story, the two later authorities on the Constitutional Law of the United States, adopted this distinction, which is indeed kept up until to-day by the majority of writers on politics. Now if a Federal State is recognised as itself a State, side by side with its member-States, it is evident that sovereignty must be divided between the Federal State on the one hand, and, on the other, the member-States. This division is made in this way, that the competence over one part of the objects for which a State is in existence is handed over to the Federal State, whereas the competence over the other part remains with the member-States. Within its competence the Federal State can make laws which bind the citizens of the member-States directly without any interference by these member-States. On the other hand, the member-States are totally independent as far as *their* competence reaches.

For International Law this division of competence is only of interest in so far as it concerns competence in *international* matters. Since it is always the Federal State which is competent to declare war, make peace, conclude treaties of alliance and other political treaties, and send and receive diplomatic envoys, whereas no member-State can of itself declare war against a foreign State, make peace, conclude alliances or other political treaties, the Federal State, if recognised, is certainly itself an International Person, with all the rights and duties of a sovereign member of the Family of Nations. On the other hand, the international position of the member-States is not so clear. It is frequently maintained that they have totally lost their position within the Family of Nations. But this opinion cannot stand if compared with the actual facts. Thus, the member-States of the Federal State of Germany, under the

German Constitution as it existed before the World War, retained their competence to send and receive diplomatic envoys, not only in intercourse with one another, but also with foreign States. Further, the reigning monarchs of these member-States were still treated by the practice of the States as heads of sovereign States, a fact without legal basis if these States had been no longer International Persons. Thirdly, the member-States of Germany, as well as of Switzerland, retained their competence to conclude international treaties between themselves without the consent of the Federal State, and they also retained the competence to conclude international treaties with foreign States as regards matters of minor interest. If these facts¹ are taken into consideration, one is obliged to acknowledge that the member-States of a Federal State can be International Persons in a degree. Full subjects of International Law—International Persons with all the rights and duties regularly connected with the membership of the Family of Nations—they certainly cannot be. Their position, if any, within this circle is overshadowed by their Federal State; they are part sovereign States, and they are, consequently, International Persons for some parts only.

But it happens frequently that a Federal State assumes *in every way* the external representation of its member-States, so that, so far as international relations are concerned, the member-States do not make an appearance at all. This is the case with the United States of America and all those other American Federal States whose Constitution is formed according to the model of that of the United States. Here the member-States are sovereign too, but only with regard to

¹ See Riess, *Auswärtige Hoheitsrechte der deutschen Einzelstaaten* (1905), and Windisch, *Die Völker-*

rechtliche Stellung der deutschen Einzelstaaten (1913).

*internal*¹ affairs. All their external sovereignty being absorbed by the Federal State, it is certainly a fact that they are not International Persons at all so long as this condition of things lasts.

This being so, two classes of Federal States must be distinguished² according to whether their member-States are or are not International Persons, although Federal States are in any case composite International Persons. And whenever a Federal State comes into existence which leaves the member-States for some parts International Persons, the recognition granted to it by foreign States must include their readiness to recognise for the future, on the one hand, the body of the member-States, the Federal State, as one composite International Person regarding all important matters, and, on the other hand, the single member-States as International Persons with regard to less important matters and side by side with the Federal State. That such a condition of things is abnormal and illogical cannot be denied, but the very existence of a Federal State side by side with the member-States is quite as abnormal and illogical.

The Federal States in existence are the following :— The United States of America since 1787, Switzerland since 1848, Germany since 1871,³ Mexico since 1857, Argentina since 1860, Brazil since 1891, Venezuela since 1893.

¹ The courts of the United States of America have always upheld the theory that the Federal Government is sovereign as to all powers of government actually surrendered, whereas each member-State is sovereign as to all powers reserved. See Merriam, *History of the Theory of Sovereignty since Rousseau* (1900), p. 163.

² This distinction is of the greatest importance and ought to be accepted

by the writers on the science of politics.

³ Under the Constitution adopted by Germany after the World War Germany remains a Federal State; but the member-States no longer enjoy the right to send or receive diplomatic envoys to or from foreign States (Article 45), nor to conclude any treaties with them, without the consent of the Federation (Articles 45 and 78).

VI

VASSAL STATES

Hall, § 4—Westlake, i. pp. 25-27—Lawrence, § 39—Phillimore, i. §§ 85-99—Twiss, i. §§ 22-36, 61-73—Taylor, §§ 140-144—Wheaton, § 37—Moore, i. § 13—Hershey, Nos. 103-104—Bluntschli, §§ 76-77—Hartmann, § 9—Heffter, §§ 19 and 22—Holtzendorff in *Holtzendorff*, ii. pp. 98-117—Liszt, § 6—Ullmann, § 25—Gareis, § 15—Bonfils, Nos. 188-190—Despagnet, Nos. 127-128—Mérignac, i. pp. 201-219—Pradier-Fodéré, i. Nos. 109-112—Nys, i. pp. 382-390—Rivier, i. § 4—Calvo, i. §§ 66-72—Fiore, i. No. 341, and *Code*, Nos. 110-115—Martens, i. §§ 60-61—Stubbs, *Suzerainty* (1882)—Baty, *International Law in South Africa* (1900), pp. 48-68—Boghitchévitch, *Halbsouveränität* (1903).

§ 90. The union and the relations between a suzerain and its vassal State create much difficulty in the science of the Law of Nations. As both are separate States, a union of States they certainly make, but it would be wrong to say that the suzerain State is, like the Real Union of States or the Federal State, a composite International Person. And it would be equally wrong to maintain either that a vassal State cannot be in any way itself a separate International Person, or that it is an International Person of the same kind as any other State. What makes the matter so complicated, is the fact that a general rule regarding the relation between the suzerain and vassal, and, further, regarding the position, if any, of the vassal within the Family of Nations, cannot be laid down, as everything depends upon the special case. What can and must be said is that there are some States in existence which, although they are independent of another State as regards their internal affairs, are as regards their international affairs either absolutely or for the most part dependent upon another State. They are called half sovereign¹ States

The Union between Suzerain and Vassal State.

¹ In contradistinction to the States which are under suzerainty or protectorate, and which are commonly

called *half* sovereign States, I call member-States of a Federal State *part* sovereign States.

because they are sovereign within their borders, but not without. The full sovereign State upon which a half sovereign State is either absolutely or for the most part internationally dependent, is called the suzerain State.

Suzerainty is a term which was originally used for the relation between the feudal lord and his vassal; the lord was said to be the suzerain of the vassal, and at that time suzerainty was a term of Constitutional Law only. With the disappearance of the feudal system, suzerainty of this kind likewise disappeared. Modern suzerainty involves only a few rights of the suzerain State over the vassal State which can be called constitutional rights. The rights of the suzerain State over the vassal are principally international rights, of whatever they may consist. Suzerainty is by no means sovereignty. If it were, the vassal State could not be sovereign in its domestic affairs and could never have any international relations whatever of its own. And why should suzerainty be distinguished from sovereignty if it be a term synonymous with sovereignty? One may correctly maintain that *suzerainty is a kind of international guardianship*, since the vassal State is either absolutely or mainly represented internationally by the suzerain State.

Inter-
national
Position
of Vassal
States.

§ 91. The fact that the relation between the suzerain and the vassal always depends upon the special case, excludes the possibility of laying down a general rule as regards the position of vassal States within the Family of Nations. It is certain that a vassal State as such need not have any position whatever within the Family of Nations. In every case in which a vassal State has absolutely no relations whatever with other States, since the suzerain absorbs these relations entirely, such vassal remains nevertheless a half sovereign State on account of its internal independence, but it has no position whatever within the Family of Nations, and consequently

is for no purpose whatever an International Person and a subject of International Law. This is the position of the Indian vassal States of Great Britain, which have no international relations¹ whatever either between themselves or with foreign States.² Yet instances can be given which demonstrate that vassal States can have some small and subordinate position within that family, and that they must in consequence thereof in some few points be considered as International Persons. Thus Egypt, while she was still a vassal State of Turkey, could conclude commercial and postal treaties with foreign States without the consent of suzerain Turkey, and Bulgaria could, while she was under Turkish suzerainty, conclude treaties regarding railways, post, and the like. Thus, further, Egypt and Bulgaria, while they were Turkish vassal States, were permitted to send and receive consuls as diplomatic agents. Thus, thirdly, the former South African Republic, although in the opinion of Great Britain under her suzerainty, could conclude all kinds of treaties with other States, provided Great Britain did not interpose a *veto* within six months after receiving a copy of the draft treaty, and was absolutely independent in concluding treaties with the neighbouring Orange Free State. Again, Egypt acquired in 1898, when she was still a Turkish vassal State, *condominium*,³ together with Great Britain, over the Soudan, which meant that they exercised conjointly sovereignty over this territory. Although vassal States have not the right to make war independently of their suzerain, Bulgaria, at the time a vassal State, nevertheless fought a war against the full sovereign Serbia

¹ See Westlake, i. pp. 41-43, and *Papers*, pp. 211-219, 620-632. See also Lee-Warner, *The Native States of India* (1910), pp. 254-279. Not to be confounded with the position of the Indian vassal State is the position of India. See below, § 94b.

² The rulers of these States cannot therefore claim the privileges which, according to International Law, are due to heads of States abroad.

³ See below, § 171.

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² The rulers of these States cannot therefore claim the privileges which, according to International Law, are due to heads of States abroad.

³ See below, § 171.

in 1885, and Egypt conquered the Soudan conjointly with Great Britain in 1898.

How could all these and other facts be explained, if vassal States could never to some small extent be International Persons?

Side by side with these facts stand, of course, other facts which show that for the most part the vassal State, even if it has some small position of its own within the Family of Nations, is considered a mere portion of the suzerain State. Thus all international treaties concluded by the suzerain State are *ipso facto* concluded for the vassal, if an exception is not expressly mentioned or self-evident. Thus, again, war of the suzerain is *ipso facto* war of the vassal. Thus, thirdly, the suzerain bears within certain limits a responsibility for actions of the vassal State.

Under these circumstances it is generally admitted that the conception of suzerainty lacks juridical precision, and experience teaches that vassal States do not remain half sovereign for ever. They either shake off suzerainty, as Roumania, Serbia, and Montenegro did in 1878, and Bulgaria¹ did in 1908, or they lose their half sovereignty through annexation, as in the case of the South African Republic in 1901, or through merger, as when the half sovereign Seignory of Kniephausen in Germany merged in 1854 into its suzerain Oldenburg.

At present all such vassal States of importance as were to some extent International Persons, have disappeared. The last was Egypt;² but on December 18,

¹ As regards the position of Bulgaria while she was a vassal State under Turkish suzerainty, see Holland, *The European Concert in the Eastern Question* (1885), pp. 277-307, and Nédjmidin, *Völkerrechtliche Entwicklung Bulgariens* (1908).

² See Holland, *The European Concert in the Eastern Question* (1885), pp. 89-205; Hesse, *Die staatsrecht-*

lichen Beziehungen Aegyptens zur hohen Pforte (1897); Grunau, *Die staats- und völkerrechtliche Stellung Aegyptens* (1903); Cocheris, *Situation internationale de l'Égypte et du Soudan* (1903); Freycinet, *La Question d'Égypte* (1905); Dungern, *Das Staatsrecht Aegyptens* (1911); Mayer, *Die völkerrechtliche Stellung Aegyptens* (1914); Moret in *R.G.*, xiv. (1907),

1914, after Turkey had joined the World War by siding with Germany and Austria, Great Britain declared Egypt to constitute a British protectorate.¹

VII

STATES UNDER PROTECTORATE

Hall, §§ 4 and 38*—Westlake, i. pp. 22-24—Lawrence, § 39—Phillimore, i. 75-82—Twiss, i. §§ 22-36—Taylor, §§ 134-139—Wheaton, §§ 34-36—Moore, i. § 14—Hershey, Nos. 105-106—Bluntschli, § 78—Hartmann, § 9—Heffter, §§ 19 and 22—Holtzendorff in *Holtzendorff*, ii. pp. 98-117—Gareis, § 15—Liszt, § 6—Ullmann, § 26—Bonfils, Nos. 176-187—Despagnet, Nos. 129-136—Mérignhac, ii. pp. 180-226—Pradier-Fodéré, i. Nos. 94-108—Nys, i. pp. 390-392—Rivier, i. § 4—Calvo, i. §§ 62-65—Fiore, i. § 341, and *Code*, Nos. 116-123—Martens, i. §§ 60-61—Pillet in *R.G.*, ii. (1895), pp. 583-608—Heilborn, *Das völkerrechtliche Protektorat* (1891), and in *Z.V.*, viii. (1914), pp. 217-232—Engelhardt, *Les Protectorats*, etc. (1896)—Gairal, *Le Protectorat international* (1896)—Despagnet, *Essai sur les Protectorats* (1896)—Boghitchévitch, *Halbsouveränität* (1903).

§ 92. Legally and materially different from suzerainty is the relation of protectorate between two States. It happens that a weak State surrenders itself by treaty² into the protection of a strong and mighty State in such a way that it transfers the management³ of all its

Concep-
tion of
 Protec-
torate.

pp. 405-417; Lamba in *R.G.*, xvii. (1910), pp. 36-55; Sayur in *Z.V.*, iii. (1909), pp. 561-617. In the case of *The Charkieh*, (1873) L.R. 4 Adm. and Eccl. 59, the court refused to acknowledge the half sovereignty of Egypt; see Phillimore, i. § 99.

¹ See *R.G.*, xxi. (1914), pp. 512-524, and M'Ilwraith in the *Journal of the Society of Comparative Legislation*, New Ser. xvii. (1917), pp. 238-259.

² This is the rule, but in the case of Egypt—see above, § 91—the protectorate was based upon a

unilateral declaration on the part of Great Britain. This was because, when Turkey, soon after the outbreak of the World War, joined the Central Powers, Egypt had for thirty-two years been under British occupation. The British protectorate will be recognised by Turkey in the Treaty of Peace with Turkey.

³ A treaty of protectorate must not be confounded with a treaty of protection in which one or more strong States promise to protect a weak State without absorbing the international relations of the latter.

more important¹ international affairs to the protecting State. Through such a treaty an international union is called into existence between the two States, and the relation between them is called protectorate. The protecting State is internationally the superior of the protected State; the latter has with the loss of the management of its more important international affairs lost its full sovereignty, and is henceforth only a half sovereign State. Protectorate is, however, a conception which, just like suzerainty, lacks exact juristic precision,² as its real meaning depends very much upon the special case. Generally speaking, protectorate may, again like suzerainty, be called *a kind of international guardianship*.

Inter-
national
Position
of States
under
 Protec-
torate.

§ 93. The position of a State under protectorate within the Family of Nations cannot be defined by a general rule, since it is the treaty of protectorate which indirectly defines it by enumerating the reciprocal rights and duties of the protecting and the protected State. Each case must therefore be treated according to its own merits. Thus the question whether the protected State can conclude certain international treaties and can send and receive diplomatic envoys, as well as other questions, must be decided according to the terms of the particular treaty of protectorate. In any case, recognition of the protectorate on the part of third States is necessary to enable the superior State to represent the protected State internationally. But it is characteristic of a protectorate, in contradis-

¹ That the admittance of consuls belongs to these affairs became apparent in 1906, when Russia, after some hesitation, finally agreed upon Japan, and not Korea, granting the *exequatur* to the consul-general appointed by Russia for Korea, which was then a State under Japanese protectorate. See below, § 427.

² It is therefore of great importance that the parties should make

quite clear the meaning of a clause which is supposed to stipulate a protectorate. Thus Article 17 of the Treaty of Friendship and Commerce between Italy and Abyssinia, signed at Ucciali on May 2, 1889—see Martens, *N.R.G.*, 2nd Ser. xviii. p. 697—was interpreted by Italy as establishing a protectorate over Abyssinia, but the latter refused to recognise it.

inction to suzerainty, that the protected State always has, and retains for some purposes, a position of its own within the Family of Nations, and that it is always for some purposes an International Person and a subject of International Law. It is never in any respect considered a mere portion of the superior State. It is, therefore, not necessarily a party in a war¹ waged by the superior State against a third State, and treaties concluded by the superior State are not *ipso facto* concluded for the protected State. And, lastly, it can at the same time be under the protectorate of two different States, which, of course, must exercise the protectorate conjointly.

In Europe there are at present four protectorates :—The Republic of Andorra is under the joint protectorate of France and Spain.² The Republic of San Marino, an enclosure of Italy, formerly under the protectorate of the Papal States, is now under the protectorate of Italy. Iceland, formerly a part of Denmark, is since December 1, 1918, an independent State under the protectorate³ of Denmark. Danzig is placed by the Treaty of Peace with Germany under the protectorate of the League of Nations.⁴

Of former protectorates in Europe the following may be mentioned :—The principality of Monaco,⁵ which

¹ This was recognised by the English prize courts during the Crimean War with regard to the Ionian Islands, which were then still under British protectorate; see the case of *The Ionian Ships*, 2 Spinks 212, and Phillimore, i. § 77.

² This protectorate is exercised for Spain by the Bishop of Urgel. As regards the international position of Andorra, see Vilar, *L'Andorre* (1905).

³ The status of Iceland in her relation to Denmark, according to what is called the 'Law of Confederation'—(not yet printed in Martens)—is difficult to define.

Since the foreign affairs of Iceland will be conducted by Denmark, the assertion that Denmark exercises a protectorate would seem to be correct.

⁴ See Articles 102-104 of the Treaty of Peace with Germany. The protectorate of the League of Nations over Danzig is to be exercised by Poland, because Poland is to conduct the foreign relations of Danzig.

⁵ Macey, *Statut international de Monaco* (1913). But see now the Treaty of July 17, 1918 (? 1919), between France and Monaco—(not yet printed in Martens)—defining the future relations between France and the Principality.

was under the protectorate of Spain from 1523 to 1641, afterwards of France until 1814, and then of Sardinia, has now through *desuetudo* become a full sovereign State, since Italy has never exercised the protectorate. The Ionian Islands, which were under British protectorate from 1815, merged into the Kingdom of Greece in 1863. The free State of Cracow, which was created in 1815 by the Vienna Congress, and put under the joint protectorate of Austria, Russia and Prussia, was annexed by Austria in 1846.

Protec-
torates
outside
the
Family of
Nations.

§ 94. Outside Europe there are numerous States under the protectorate of European States, but all of them are non-Christian States of such a civilisation as would not admit them to full membership of the Family of Nations, apart from the protectorate under which they now are. It may therefore be questioned whether they have any real position within the Family of Nations at all. As the protectorate over them is recognised by third States, the latter are legally prevented from exercising any political influence in these protected States, and, failing special treaty rights, they have no right to interfere if the protecting State annexes the protected State and makes it a mere colony of its own, as, for instance, France did with Madagascar in 1896. Protectorates of this kind are in many cases, although not necessarily, nothing else than the first step to annexation. Examples of such protectorates outside Europe are the French over Tunis and Morocco, and the English over Zanzibar and Egypt.

Be that as it may, these protectorates are exercised over real States. For this reason they must not in every way be compared with the so-called protectorates over African tribes, which European States acquire through a treaty with the chiefs of these tribes, and by which the territory in question is preserved for future occupation on the part of the so-called

protector.¹ In practice they always lead to annexation, if the protected State does not succeed in shaking off the protectorate by force, as Abyssinia shook off the pretended Italian protectorate in 1896.

VIII

SELF-GOVERNING DOMINIONS ²

Keith, *Responsible Government in the Dominions* (1912)—*Imperial Unity and the Dominions* (1916)—Lawrence in Hearnshaw, *King's College Lectures on Colonial Problems* (1913), pp. 3-32—Ewart in *A.J.*, vii. (1913), pp. 268-284—Tupper in the *Journal of the Society of Comparative Legislation*, New Ser. xvii. (1917), pp. 5-18—Keith, *ibid.*, xviii. (1918), p. 54—Grey in *The Times*, January 31, 1920.

94a. Formerly the position of self-governing Dominions, such as Canada, Newfoundland, Australia, New Zealand, and South Africa, did not in International Law present any difficulties. Then they had no international position whatever, because they were, from the point of view of International Law, mere colonial portions of the mother country. It did not matter that some of them, as, for example, Canada and Australia, flew as their own flag the modified flag of the mother country, or that they had their own coinage, their own postage stamps, and the like. Nor did they become subjects of International Law (although the position was somewhat anomalous) when they were admitted, side by side with the mother country, as parties to administrative unions, such as the Universal Postal Union. Even when they were empowered³ by the mother country to enter into certain treaty arrangements of minor importance with foreign States, they

Former
Position
of Self-
govern-
ing Dom-
inions.

¹ See below, § 226, and Perrinjaquet in *R.G.*, xvi. (1909), pp. 316-367.

² These two sections were roughly drafted by the author; but events

have moved so rapidly that the editor has been reluctantly compelled to make considerable modifications, especially in the second of them.

³ See below, § 496a.

still did not thereby become subjects of International Law, but simply exercised for the matters in question the treaty-making power of the mother country which had been to that extent delegated to them.

Présent
Position
of Self-
govern-
ing Dom-
inions.

94*b*. But the position of self-governing Dominions underwent a fundamental change at the end of the World War. Canada, Australia, New Zealand, South Africa, and also India were not only separately represented within the British Empire delegation at the Peace Conference, but also became, side by side with Great Britain, original members of the League of Nations. Separately represented in the Assembly of the League, they may, of course, vote there independently of Great Britain. Now the League of Nations is not a mere administrative union like the Universal Postal Union, but—see below, § 167*c*—the organised Family of Nations. Without doubt, therefore, the admission of these four self-governing Dominions and of India to membership gives them a position in International Law.

But the place of the self-governing Dominions within the Family of Nations at present defies exact definition, since they enjoy a special position, corresponding to their special status within the British Empire as ‘free communities, independent as regards all their own affairs, and partners in those which concern the Empire at large.’¹ Moreover, just as, in attaining to that position, they have silently worked changes, far-reaching but incapable of precise definition, in the Constitution of the Empire, so that the written law inaccurately represents the actual situation, in a similar way they have taken a place within the Family of Nations, which is none the less real for being hard to reconcile with precedent. Furthermore, they will certainly consolidate the positions which they have won, both within the Empire and within the Family of

¹ Viscount Grey in *The Times*, January 31, 1920.

Nations. An advance in one sphere will entail an advance in the other. For instance, they may well acquire a limited right of legation¹ or limited treaty-making power. But from this time onwards the relationship between Great Britain and the self-governing Dominions of the British Empire is not likely to correspond exactly to any relationship hitherto recognised in International Law unless the British Empire should turn into a Federal State.

IX

NEUTRALISED STATES

Westlake, i. pp. 27-31—Lawrence, §§ 43 and 225—Taylor, § 133—Hershey, No. 109—Moore, i. § 12—Bluntschli, § 745—Heffter, § 145—Geffcken in *Holtzendorff*, iv. pp. 634-656—Gareis, § 15—Liszt, § 6—Ullmann, § 27—Bonfils, Nos. 348-369—Despagnet, Nos. 137-146—Mérignhac, ii. pp. 56-65—Pradier-Fodéré, ii. Nos. 1001-1015—Nys, i. pp. 410-431—Rivier, i. § 7—Calvo, iv. §§ 2596-2610—Piccioni, *Essai sur la Neutralité perpétuelle* (2nd ed. 1902)—Regnault, *Des Effets de la Neutralité perpétuelle* (1898)—Tswettcoff, *De la Situation juridique des États neutralisés* (1895)—Wicker, *Neutralisation* (1911)—Descamps, *L'État neutre à Titre permanent* (1912)—Richter, *Die Neutralisation von Staaten* (1913)—Krauel, *Neutralität, Neutralisation, und Befriedung im Völkerrecht* (1915)—Morand in *R.G.*, i. (1894), pp. 522-537—Hagerup in *R.G.*, xii. (1909), pp. 577-602—Nys in *R.I.*, 2nd Ser. ii. (1900), pp. 467 and 583, iii. (1901), p. 15—Westlake in *R.I.*, 2nd Ser. iii. (1901), pp. 389-397—Winslow in *A.J.*, ii. (1908), pp. 366-386—Wicker in *A.J.*, v. (1911), pp. 639-652—Erich in *Z.V.*, vii. (1913), pp. 452-476—La Fontaine, Wicker, and others in the *Proceedings of the American Society of International Law*, vol. xi. (1917), pp. 125-145.

§ 95. A neutralised State is a State whose independence and integrity are for all the future guaranteed by an international convention of the Powers, under the condition that such State binds itself never to take up arms against any other State except for defence against attack, and never to enter into such international

Concep-
tion of
Neutral-
ised
States.

¹ It has now (May 1920) been officially announced that a Canadian Minister is to be appointed to represent Canadian interests at Washington.

obligations as could indirectly drag it into war. The reason why a State asks or consents to become neutralised is that it is a weak State and does not want an active part in international politics, being exclusively devoted to peaceable developments of welfare. The reason why the Powers neutralise a weak State may be a different one in different cases. The chief reasons have been hitherto the balance of power in Europe and the interest in keeping up a weak State as a so-called buffer-State between the territories of Great Powers.

Not to be confounded¹ with neutralisation of States is, in the first place, neutralisation of parts of States, of rivers, canals, and the like, which has the effect that war cannot there be made and prepared; secondly, the special protection arranged, for the term of war, in special conventions for certain establishments; and thirdly, the unilateral declaration of a State that it will always remain neutral.²

Act and
Condition
of Neutra-
lisation.

§ 96. Without thereby becoming a neutralised State, every State can conclude a treaty with another State and undertake the obligation to remain neutral if such other State enters upon war. The act through which a State becomes a neutralised State for all the future is always an international treaty of the Powers between themselves and between the State concerned, by which treaty the Powers guarantee collectively the independence and integrity of the latter State. If all the Great Powers do not take part in the treaty, those which do not take part in it must at least give their tacit consent, by taking up an attitude which shows that they agree to the neutralisation, although they do not guarantee it. In guaranteeing the permanent neutrality of a State the contracting Powers enter into an obligation

¹ See below, vol. ii. § 72.

² On so-called 'autonomous neutralisation,' see Robertson in *A.J.*, xi. (1917), pp. 607-616. There is no

doubt that any State can declare itself permanently neutral, but it is not 'neutralised' in the sense hitherto understood.

not to violate on their part the independence of the neutral State, and to prevent other States from such violation. But the neutral State becomes, apart from the guaranty, in no way dependent upon the guarantors, and the latter gain no influence whatever over the neutral State in matters which have nothing to do with the guaranty.

The condition of the neutralisation is that the neutralised State abstains from any hostile action, and further from any international engagement which could indirectly¹ drag it into hostilities against any other State. And it follows from the neutralisation that the neutralised State can, apart from frontier regulations, neither cede a part of its territory nor acquire new parts of territory without the consent of the Powers.²

§ 97. Since a neutralised State is under the obligation not to make war against any other State, except when attacked, and not to conclude treaties of alliance, guaranty, and the like, it is frequently maintained that neutralised States are part sovereign only, and not International Persons of the same position within the Family of Nations as other States. This opinion has, however, no basis if the real facts and conditions of their neutralisation are taken into consideration. If sovereignty is nothing else than supreme authority, a neutralised State is as fully sovereign as any not-neutralised State. It is entirely independent outside as well as inside its borders, since independence does not at all

Inter-
national
Position
of Neu-
tralised
States.

¹ It was, therefore, impossible for Belgium, at that time herself a neutralised State and a party to the treaty that neutralised Luxemburg in 1867, to take part in the guarantee of that neutralisation. See Article 2 of the Treaty of London of May 11, 1867: 'Sous la sanction de la garantie collective des puissances signataires, à l'exception de la Belgique, qui est elle-même un état neutre.'

² This is a much discussed and very controverted point. See Piccioni, *op. cit.*, p. 82; Descamps, *La Neutralité de la Belgique* (1902), pp. 508-527; Fauchille in *R.G.*, ii. (1895), pp. 400-439; Westlake in *R.I.*, 2nd Ser. iii. (1901), p. 396; Graux in *R.I.*, 2nd Ser. vii. (1905), pp. 33-52; Rivier, i. p. 172; Descamps, *L'État neutre à Titre permanent*, (1912), pp. 215-217. See also below, § 215.

mean boundless liberty of action.¹ Nobody maintains that the guaranteed protection of the independence and integrity of the neutralised State places this State under the protectorate or any other kind of authority of the guarantors. And the condition of neutralisation to abstain from war, treaties of alliance, and the like, contains restrictions which do in no way destroy the full sovereignty of the neutralised State. Such condition has the consequence only that the neutralised State exposes itself to an intervention by right, and loses the guaranteed protection, in case it commits hostilities against another State, enters into a treaty of alliance, and the like. Just as a not-neutralised State which has concluded treaties of arbitration with other States to settle all conflicts between the parties by arbitration has not lost part of its sovereignty because it has thereby to abstain from arms, so a neutralised State has not lost part of its sovereignty through entering into the obligation to abstain from hostilities and treaties of alliance. This becomes quite apparent when it is taken into consideration that a neutralised State not only can conclude treaties of all kinds, except treaties of alliance, guarantee, and the like, but can also have an army and navy² and can build fortresses, as long as this is done with the purpose of preparing defence only. Neutralisation does not even exercise an influence upon the rank of a State. Switzerland is a State with royal honours and does not rank behind Great Britain or any other of the guarantors of her neutralisation. Nor is it denied that neutralised States, in spite of their weakness and comparative unimportance, can nevertheless play an important part within the Family of Nations. Although she has no voice

¹ See below, § 126.

² The case of Luxemburg, which became neutralised under the con-

dition not to keep an armed force with the exception of a police, was an anomaly.

where history is made by the sword, Switzerland has exercised great influence with regard to several points of progress in International Law. Thus the Geneva Convention owes its existence to the initiative of Switzerland. The fact that a permanently neutralised State is in many questions a disinterested party makes such State fit to take the initiative where action by a Great Power would create suspicion and reserve on the part of other Powers.

But neutralised States must always be an exception. The Family and the Law of Nations could not be what they are, if there were a great number of neutralised States. It is neither in the interest of the Law of Nations, nor in that of humanity, that all the smaller States should become neutralised, as thereby the political influence of the few Great Powers would become still greater than it already is. It was the nineteenth century which called neutralised States into existence—namely, Cracow, Switzerland, Belgium, and Luxemburg.¹ The Republic of Cracow² was by the Vienna Congress of 1815 created an independent and permanently neutralised State under the joint protection of Austria, Prussia, and Russia; but Austria annexed it in 1846. Belgium³ and Luxemburg⁴ ceased to be neutralised in consequence of the World War. Switzerland is therefore the only neutralised State in existence. The establishment of the League of Nations will probably have the consequence that in future no other States will become neutralised, because there will probably be no demand for it.

¹ As regards the former Congo Free State, see below, § 101. It should be noted that Article 10 of the Peace Treaty of Amiens of 1802 stipulated that the island of Malta, together with the islands of Goco and Comino, should be handed back to the Knights of the Order of St. John, and permanently neutralised

under the guarantee of England, Austria, France, Spain, Prussia, and Russia. However, as war broke out again in 1803, this stipulation was never executed.

² See Nys, i. pp. 414-417.

³ See below, § 99.

⁴ See below, § 100.

Switzerland.

§ 98. The Swiss Confederation,¹ which was recognised by the Westphalian Peace of 1648, has pursued a traditional policy of neutrality since that time. During the French Revolution and the Napoleonic Wars, however, it did not succeed in keeping up its neutrality. French intervention brought about in 1798 a new Constitution, according to which the several cantons ceased to be independent States, and Switzerland turned from a Confederation of States into the simple State of the Helvetic Republic, which was, moreover, through a treaty of alliance, linked to France. It was not till 1814 that Switzerland became again a Confederation of States, and not till 1815 that she succeeded in becoming permanently neutralised. On March 20, 1815, at the Congress at Vienna, Great Britain, Austria, France, Portugal, Prussia, Spain, Sweden, and Russia signed the declaration in which the permanent neutrality of Switzerland was recognised and collectively guaranteed, and on May 27, 1815, Switzerland acceded to this declaration. Article 84 of the Act of the Vienna Congress confirmed this declaration, and an Act, dated November 20, 1815, of the Powers assembled at Paris after the final defeat of Napoleon, recognised it again.² Since that time Switzerland has always succeeded in keeping up her neutrality. She has built fortresses and organised a strong army for that purpose, and in January 1871, during the Franco-German War, she disarmed a French army of more than eighty thousand men who had taken refuge on her territory, and guarded them till after the war.

Belgium.

§ 99. Belgium³ became neutralised from the moment

¹ See Schweizer, *Die Geschichte der schweizerischen Neutralität*, 2 vols. (1895), and Sherman in *A.J.*, xii. (1918), pp. 241-250, 462-474, and 780-795.

² See Martens, *N.R.*, ii. pp. 157, 173, 419, 740.

³ See Descamps, *La Neutralité de la Belgique* (1902), and *L'État neutre à Titre permanent* (1912); Sanger and Norton, *England's Guarantee to Belgium and Luxemburg* (1915).

she was recognised as an independent State in 1831. The Treaty of London, signed on November 15, 1831, by Great Britain, Austria, Belgium, France, Prussia, and Russia, stipulated at the same time in Article 7 the independence and the permanent neutrality of Belgium, and in Article 25 the guaranty of the signatory five Great Powers.¹ And the guaranty was renewed in Article 2 of the Treaty of London of April 19, 1839,² to which the same Powers were parties, and which was the final treaty concerning the separation of Belgium from the Netherlands.

The neutrality of Belgium was violated in 1914, when Germany attacked her for the purpose of invading France through Belgian territory. For this reason Belgium, at the conference after the World War, asked that she should cease to be neutralised, and the Powers acceded to her demand. By Article 31 of the Treaty of Peace with Germany, Germany consents to the abrogation of the Treaties of April 19, 1839, which established the status of Belgium before the war, and undertakes to observe the new arrangements which are to be made by the Principal Allied and Associated Powers, in concert with Belgium and Holland. By Article 83 of the Treaty of Peace with Austria, Austria consents, and gives an undertaking, in similar terms.

§ 100. The Grand Duchy of Luxemburg³ was from 1815 to 1866 in personal union with the Netherlands, but at the same time a member of the Germanic Confederation, and Prussia had after 1856 the right to keep troops in the fortress of Luxemburg. In 1866 the Germanic Confederation came to an end, and Napoleon III. made efforts to acquire Luxemburg by purchase from the King of Holland, who was at the same time Grand Duke

¹ See Martens, *N.R.*, xi. pp. 394 and 404.

² See Martens, *N.R.*, xvi. p. 770.

³ See Eyschen in *R.I.*, 2nd Ser. i. (1899), p. 5-42; Wompach, *Le Luxembourg neutre* (1900); Sanger and Norton, *op. cit.*

of Luxemburg. As Prussia objected to this, it seemed advisable to the Powers to neutralise Luxemburg. A conference met in London, at which Great Britain, Austria, Belgium, France, Holland and Luxemburg, Italy, Prussia, and Russia were represented, and on May 11, 1867, a treaty was signed for the purpose of its neutralisation, which is stipulated and collectively guaranteed by all the signatory Powers, Belgium as a neutralised State herself excepted, by Article 2.¹

The neutralisation took place, however, under the abnormal condition that Luxemburg was not allowed to keep any armed force, with the exception of a police for the maintenance of safety and order, nor to possess any fortresses. Germany violated the neutrality of Luxemburg in 1914 for the purpose of invading France, and its neutralisation, like that of Belgium, came to an end as a result of the World War. By Article 40 of the Treaty of Peace with Germany, Germany adheres to its termination, and agrees to accept the arrangements which may be made regarding Luxemburg by the Allied and Associated Powers. By Article 84 of the Treaty of Peace with Austria, Austria agrees likewise.

§ 101. The former Congo Free State,² which was recognised as an independent State by the Berlin Congo Conference³ of 1884-1885, was a permanently neutralised State from 1885-1908, but its neutralisation was imperfect in so far as it was not guaranteed by the Powers. This fact is explained by the circumstances under which the Congo Free State attained its neutralisation. Article 10 of the General Act of the Congo Conference of Berlin stipulated that the signatory Powers should respect the neutrality of any territory within the Congo district,

¹ See Martens, *N.R.G.*, xviii. p. 448.

² Moynier, *La Fondation de l'État indépendant du Congo* (1887); Hall, 26**; Westlake, i. p. 30; Navez, *Essai historique sur l'État indépen-*

dant du Congo, vol. i. (1905); Reeves in *A.J.*, iii. (1909), pp. 99-118.

³ See Protocol 9 of that conference in Martens, *N.R.G.*, 2nd Ser. x. p. 353.

provided the Power then or thereafter in possession of the territory proclaimed its neutrality. Accordingly, when the Congo Free State was recognised by the Congress of Berlin, the King of the Belgians, as the sovereign of the Congo State, declared ¹ it permanently neutral, and this declaration was notified to, and recognised by, the Powers. Since the Congo Conference did not guarantee the neutrality of the territories within the Congo district, the neutralisation of the Congo Free State was not guaranteed either. In 1908 ² the Congo Free State merged by cession into Belgium.

X

NON-CHRISTIAN STATES

Westlake, i. p. 40—Phillimore, i. §§ 27-33—Bluntschli, §§ 1-16—Heffter, § 7—Gareis, § 10—Rivier, i. pp. 13-18—Bonfils, No. 40—Martens, § 41—Nys, i. pp. 126-137—Westlake, *Papers*, pp. 141-143.

§ 102. It will be remembered from the previous discussion of the dominion ³ of the Law of Nations that this dominion extends beyond the Christian States, and includes now, among other non-Christian States, the Mohammedan State of Turkey and the Buddhistic State of Japan. As all full sovereign International Persons are equal to one another, no essential difference exists within the Family of Nations between Christian and non-Christian States. That foreigners residing in Turkey were before the World War still under the exclusive jurisdiction of their consuls, was an anomaly based on a restriction on territorial supremacy arising partly from

No essential difference between Christian and other States.

¹ See Martens, *N.R.G.*, 2nd Ser. xvi. p. 585.

² See Martens, *N.R.G.*, 3rd Ser. ii. pp. 101, 106, 109, and Delpech and Marcaggi in *R.G.*, xviii. (1911), pp. 105-163. See also Brunet, *L'Annexion du Congo à la Belgique*

et le Droit international (1911). The question is doubtful, whether the guarantee of the neutrality of Belgium extended to the territory of the former Congo Free State *ipso facto* by its merger into Belgium.

³ See above, § 28.

custom and partly from treaties. In September 1914, Turkey denounced these restrictions, but her act called forth immediate protest, and the matter is to be dealt with by the Treaty of Peace with Turkey. Turkey will be called upon to accept a scheme of judicial reform, drafted by the British Empire, France, Italy, and Japan, assisted by experts of other Powers which enjoy extraterritorial jurisdiction in Turkey. This new system is to replace the system existing before the World War, and generally called the '*régime* of the Capitulations.'

Inter-
national
Position
of non-
Christian
States
except
Turkey
and
Japan.

§ 103. Doubtful before the World War was the position of all non-Christian States except Turkey and Japan, such as China, Mongolia, Siam, Persia, and further Abyssinia, although the latter is a Christian State, and although China, Persia, and Siam took part in the Hague Peace Conferences of 1899 and 1907. Their civilisation was essentially so different from that of the Christian States that international intercourse with them of the same kind as between Christian States had been hitherto impossible. And neither their Governments nor their populations were yet able fully to understand the Law of Nations and to take up an attitude which was in conformity with all the rules of this law. There should have been no doubt that these States were not International Persons of the same kind and the same position within the Family of Nations as Christian States. But it would have been equally wrong to maintain that they were absolutely outside the Family of Nations, and were for no part International Persons. Since they used to send and receive diplomatic envoys and conclude international treaties, the opinion was justified that such States were International Persons only in some respects—namely, those in which they had expressly or tacitly been received into the Family of Nations. When Christian States began such intercourse with these

non-Christian States as to send diplomatic envoys to them and receive their diplomatic envoys, and when they entered into treaty obligations with them, they indirectly declared that they were ready to recognise them for these parts as International Persons and subjects of the Law of Nations. But for other parts such non-Christian States remained as yet outside the circle of the Family of Nations, especially with regard to war, and they were for those parts treated by the Christian Powers according to discretion. Some of them were the subjects of international arrangements of great political importance. Thus by the Treaty of London of December 13, 1906, Great Britain, France, and Italy agreed to co-operate in maintaining the independence and integrity of Abyssinia,¹ and by the Treaty of St. Petersburg² of August 18, 1907, Great Britain and Russia agreed upon the integrity and independence of Persia and Afghanistan, and recognised the protectorate of China over Thibet. During the World War, Siam and China took part on the side of the Allied and Associated Powers, and at its close Siam, China, and Persia became original members of the League of Nations. The position of Abyssinia remains unchanged.

XI

THE HOLY SEE

Hall, § 98—Westlake, i. pp. 37-39—Phillimore, ii. §§ 278-440—Twiss, i. §§ 206-207—Taylor, §§ 277, 278, 282—Warton, i. § 70, p. 546—Hershey, No. 89, p. 95—Moore, i. § 18—Bluntschli, § 172—Heffter, §§ 40-41—Geffcken in Holtzendorff, ii. pp. 151-222—Gareis, § 13—Liszt, § 5—Ullmann, § 28—Bonfilis, Nos. 370-396—Despagnet, Nos. 147-164—Mérignhac, ii. pp. 119-153—Nys, ii. pp. 349-376—Rivier, i. § 8—Fiore, i. Nos. 520, 521—Martens, i. § 84—Fiore, *Della Condizione giuridica inter-*

¹ See Martens, *N.R.G.*, 2nd Ser. xxxv. p. 556, and 3rd Ser. v. p. 733.

² See Martens, *N.R.G.*, 3rd Ser. i. p. 8.

nazionale della Chiesa e del Papa (1887)—Bompard, *Le Pape et le Droit des Gens* (1888)—Imbart-Latour, *La Papauté en Droit international* (1893)—Olivart, *Le Pape, les États de l'Église et l'Italie* (1897)—Le Fur, *Le Saint-Siège et la Cour de Cassation* (1911)—Lampert, *Die völkerrechtliche Stellung des apostolischen Stuhles* (1916)—Praag, Nos. 6, and 272-274—Chrétien, in *R.G.*, vi. (1899), pp. 281-291—Bompard in *R.G.*, vii. (1900), pp. 369-387—Flaischlen in *R.I.*, 2nd Ser. vi. (1904), pp. 85-94—Higgins in the *Journal of the Society of Comparative Legislation*, New Ser. ix. (1909), pp. 252-264—Gidel in *R.G.*, xviii. (1911), pp. 589-620—Donnedieu in *R.G.*, xxi. (1914), pp. 339-379—Scelle in *R.G.*, xxiv. (1917), pp. 244-255.

The
former
Papal
States.

§ 104. When the Law of Nations began to grow up among the States of Christendom, the Pope was the monarch of one of those States—namely, the so-called Papal States. This State owed its existence to Pepin-le-Bref and his son Charlemagne, who established it in gratitude to the Popes Stephen II. and Adrian I., who crowned them as Kings of the Franks. It remained in the hands of the Popes till 1798, when it became a Republic for about three years. In 1801 the former order of things was re-established, but in 1809 it became a part of the Napoleonic Empire. In 1814 it was re-established, and remained in existence till 1870, when it was annexed to the Kingdom of Italy. Throughout the existence of the Papal States, the Popes were monarchs, and, as such, equals of all other monarchs. Their position was, however, even then anomalous, as their influence and the privileges granted to them by the different States were due, not alone to their being monarchs of a State, but to their being the head of the Roman Catholic Church. But this anomaly did not create any real difficulty, since the privileges granted to the Popes existed within the province of precedence only.

The
Italian
Law of
Guaranty.

§ 105. When, in 1870, Italy annexed the Papal States and made Rome her capital, she had to undertake the task of creating a position for the Holy See and the Pope which was consonant with the importance of the

latter to the Roman Catholic Church. It seemed impossible that the Pope should become an ordinary Italian subject and that the Holy See should be an institution under the territorial supremacy of Italy. For many reasons no alteration was desirable in the administration by the Holy See of the affairs of the Roman Catholic Church or in the position of the Pope as the inviolable head of that Church. To meet the case the Italian Parliament passed an Act regarding the guaranties granted to the Pope and the Holy See, which is commonly called the 'Law of Guaranty.' According to this the position of the Pope and the Holy See is in Italy as follows :—

The person of the Pope is sacred and inviolable (Article 1), although he is subjected to the civil courts of Italy.¹ An offence against his person is to be punished in the same way as an offence against the King of Italy (Article 2). He enjoys all the honours of a sovereign, retains the privileges of precedence conceded to him by the Roman Catholic monarchs, has the right to keep an armed bodyguard of the same strength as before the annexation for the safety of his person and of his palaces (Article 3), and receives an allowance of 3,225,000 francs (Article 4). The Vatican, the seat of the Holy See, and the palaces where a conclave for the election of a new Pope or where an Oecumenical Council meets, are inviolable, and no Italian official is allowed to enter them without consent of the Holy See (Articles 5-8). The Pope is absolutely free in performing all the functions connected with his mission as head of the Roman Catholic Church, and so are his officials (Articles 9 and 10). The Pope has the right to send and to receive envoys, who enjoy all the privileges of the diplomatic envoys sent and received by Italy (Article 11). The freedom of communication between the Pope and the

¹ See Bonfils, No. 379.

entire Roman Catholic world is recognised, and the Pope has therefore the right to a post and telegraph office of his own in the Vatican or any other place of residence, and to appoint his own post-office clerks (Article 12). And, lastly, the colleges and other institutions of the Pope for the education of priests in Rome and the environments remain under his exclusive supervision, without any interference on the part of the Italian authorities (Article 13).

No Pope has as yet recognised this Italian Law of Guaranty, nor had foreign States an opportunity of giving their express consent to the position of the Pope in Italy created by that law. But in practice foreign States as well as the Popes themselves, although the latter have never ceased to protest against the condition of things created by the annexation of the Papal States, have made use of the provisions¹ of that law. Several foreign States send, side by side with their diplomatic envoys accredited to Italy, special envoys to the Pope, and the latter sends envoys to several foreign States.

Inter-
national
Position
of the
Holy See
and the
Pope.

§ 106. The Law of Guaranty is not International but Italian Municipal Law, and the members of the Family of Nations have hitherto not made any special arrangements with regard to the international position of the Holy See and the Pope. (And, further, there ought to be no doubt² that since the extinction of the Papal States the Pope is no longer a monarch whose sovereignty is derived from his position as the head of a State. For these reasons many writers³ maintain

¹ But the Popes have hitherto never accepted the allowance provided by the Law of Guaranty.

² But a number of writers—basing their opinion upon a Circular Note of Cardinal Jacobin of September 11, 1882—assert that even nowadays the Holy See is a real State and the

Pope its monarch, such State consisting of the Vatican and its dependencies, and its subjects being those individuals who live in the Vatican.

³ Westlake, i. p. 38, joined the ranks of these writers.

that the Holy See and the Pope have no longer any international position whatever according to the Law of Nations, since, apart from the League of Nations, States only and exclusively are International Persons. But if the facts of international life and the actual condition of things in everyday practice are taken into consideration, this opinion has no basis to stand upon. Although the Holy See is not a State, the envoys sent by her to foreign States are treated by the latter on the same footing with diplomatic envoys as regards exterritoriality, inviolability, and ceremonial privileges, and those foreign States which send envoys to the Holy See claim for them from Italy all the privileges and the position of diplomatic envoys. Further, although the Pope is no longer the head of a State, most privileges due to the head of a monarchical State are still granted to him by foreign States. Of course, through this treatment the Holy See does not acquire the character of an International Person, nor does the Pope thereby acquire the character of a head of a monarchical State. But for some purposes the Holy See is in fact treated as though she were an International Person, and the Pope is treated in practice for the most part as though he were the head of a monarchical State. It must therefore be maintained that by custom, by tacit consent of the members of the Family of Nations, the Holy See has a *quasi*-international position.¹ This position allows her to claim against all the States treatment on some points as though she were an International Person, and, further, to claim treatment of the Pope for the most part as though he were the head of a monarchical State. But it must be emphasised that, although the envoys sent and received by the Holy

¹ That the Holy See does not thereby become a subject of International Law is apparent, since—see above, § 63—the distinction

between normal and artificial subjects of International Law is not admissible. But see Gidel in *R.G.*, xviii. (1911), p. 604.

See must be treated as diplomatic envoys,¹ they are not such in fact, for they are not agents for international affairs of States, but exclusively agents for the affairs of the Roman Catholic Church. And it must further be emphasised that the Holy See cannot conclude international treaties or claim a vote at international congresses and conferences. This does not mean that the Powers could not, if they liked, invite an envoy of the Pope to a congress or conference, and concede him a vote ; it only means that the Pope, not being a head of a State, cannot claim a *right* to be represented at a congress or conference, and a *right* to a vote. Again, the so-called *concordats*—that is, treaties between the Holy See and States with regard to matters of the Roman Catholic Church—are not international treaties, although analogous treatment is usually given to them. Even formerly, when the Pope was the head of a State, such *concordats* were not concluded with the Papal States, but with the Holy See and the Pope as representatives of the Roman Catholic Church.

§ 106a. Whereas the international position of the

¹ The case of Montagnini, which occurred in December 1906, cannot be quoted against this assertion, for Montagnini was not at the time a person enjoying diplomatic privileges. Diplomatic relations between France and the Holy See had come to an end in 1904 by France recalling her envoy at the Vatican and at the same time sending his passports to Lorenzelli, the Papal Nuncio in Paris. Montagnini, who remained at the nunciature in Paris, did not possess any diplomatic character after the departure of the Nuncio. Neither his arrest and his expulsion in December 1906, nor the seizure of his papers at the nunciature, amounted therefore to an international delinquency on the part of the French Government. The papers left by the former Papal Nuncio, Lorenzelli, were not touched, and remained in the

archives of the former nunciature until the Austrian ambassador in Paris, in February 1907, asked the French Foreign Office to transfer them to him for the purpose of handing them on to the Holy See. It must be specially mentioned that the seizure of his papers and the arrest and expulsion of Montagnini took place because he conspired against the French Government by encouraging the clergy to refuse obedience to French laws. And it must further be mentioned that Lorenzelli, when he left the nunciature, did not, contrary to all precedent, place the archives of the nunciature under seals and confide them to the protection of another diplomatic envoy in Paris. Details of the case are to be found in *R.I.*, 2nd Ser. ix. (1907), pp. 90-96, and *R.G.*, xiv. (1907), pp. 175-186.

Holy See and the Pope is secured in time of peace, nothing can be said to be definitely settled with regard to their position in case Italy is at war. Indeed, the Italian Law of Guaranty does not make any difference between the position of the Holy See and the Pope in time of peace and in time of war, but the matter is nevertheless uncertain. Thus when Italy in May 1915 entered the World War by declaring war upon Austria, the question arose whether the Austrian and German Ambassadors accredited to the Holy See could remain in Rome, or whether Italy could insist upon their departure. To avoid difficulties the Pope asked them to depart. There is also the question whether military reasons might not compel Italy when at war to restrict the absolute freedom of communication of the Holy See with the entire Roman Catholic world as guaranteed by Article 12 of the Law of Guaranty. On the other hand, in case Rome should be occupied by an enemy of Italy, the occupant, though he would no doubt respect the inviolability of the Pope, might for military reasons be disinclined to grant absolutely free communication between the Pope and the outside world.

Position
of the
Holy See
and the
Pope
when
Italy is
at War.

§ 107. Since the Holy See has no power whatever to protect herself and the person of the Pope against violations, the question as to the protection of the Holy See and the person of the Pope arises. I believe that, since the present international position of the Holy See rests on the tacit consent of the members of the Family of Nations, many a Roman Catholic Power would raise its voice in case Italy or any other State should violate the Holy See or the person of the Pope, and an intervention for the purpose of protecting either of them would have the character of an intervention by right. Italy herself would certainly make such a violation by a foreign Power her own affair, although she has no more than any other Power the legal duty to do so,

Violation
of the
Holy See
and the
Pope.

and although she is not responsible to other Powers for violations of the Personality of the latter by the Holy See and the Pope.¹

XII

STATES AT PRESENT INTERNATIONAL PERSONS

European
States.

§ 108. All the European States are, of course, members of the Family of Nations. They are the following :

Great Powers are :

Great Britain.

France.

Italy.

Germany and Russia are not at the present time Great Powers, but may well become so again.

Smaller States are :

Albania.²

Luxemburg.²

Austria.

Montenegro.²

Belgium.

Norway.

Bulgaria.

Poland.

Czecho-Slovakia.

Portugal.

Denmark.

Roumania.

Finland.

Serb-Croat-Slovene State.

Greece.

Spain.

Holland.

Sweden.

Hungary.

Turkey.

Very small, but yet full sovereign, States are :

Monaco³ and Lichtenstein.

¹ Was the confiscation in 1916 of the Palais de Venice, the seat of the Austrian Legation at the Holy See, a violation of the Pope's Personality? The Pope protested against the confiscation as a violation of his privileges. See below, § 390 n., and Scelle in *R.G.*, xxiv. (1917), pp. 244-255.

² The future status of Albania, Luxemburg, and Montenegro is, however, at present unsettled.

³ But see now the treaty between France and Monaco referred to above, § 93.

Neutralised State is :

Switzerland.

Half sovereign States are :

Andorra (under the protectorate of France and Spain).

San Marino (under the protectorate of Italy).

Danzig (under Articles 102-104 of the Treaty of Peace with Germany a Free City, and therefore an independent State. But it is only half sovereign, because it is placed under the protection of the League of Nations, and its foreign relations are conducted by Poland).

Part sovereign States are :

(a) Member-States of Germany.

(b) Member-States of Switzerland :

Zurich, Berne, Lucerne, Uri, Schwyz, Unterwalden (ob und nid dem Wald), Glarus, Zug, Fribourg, Soleure, Basle (Stadt und Landschaft), Schaffhausen, Appenzell (beider Rhoden), St. Gall, Grisons, Aargau, Thurgau, Tessin, Vaud, Valais, Neuchâtel, Geneva.

The position of the territories (other than Finland and Poland) which formed part of the Russian Empire is still unsettled. The British Government has recognised the Governments of Esthonia, Lithuania, and Latvia as *de facto* Governments, but these territories have not so far secured recognition as independent States.

§ 109. In America there are twenty-one States which are members of the Family of Nations, but it must be emphasised that the member-States of the five Federal States on the American continent, although they are part sovereign, have no footing within the Family of Nations, because the American Federal States, in con-

American
States.

tradistinction to Switzerland, absorb all possible international relations of their member-States.

In North America ¹ there are :

Great Power : The United States of America.

Smaller State : The United States of Mexico.

In Central America there are :

Costa Rica.

Honduras.

Cuba.

Nicaragua.

San Domingo.

Panama.

Guatemala.

San Salvador.

Haiti.

In South America there are :

The United States of

Ecuador.

Argentina.

Paraguay.

Bolivia.

Peru.

The United States of

Uruguay.

Brazil.

The United States of

Chili.

Venezuela.

Colombia.

African
States.

§ 110. In Africa ¹ there are :

Full sovereign States :

Abyssinia.²

Liberia.

Half sovereign States :

Egypt (under British protectorate).

Tunis

Morocco } (under French protectorate).

The Soudan has an exceptional position ; being under the *condominium* of Great Britain and Egypt, a footing of its own within the Family of Nations the Soudan certainly has not.

¹ As to the position of Canada and Newfoundland in North America, South Africa in Africa, India in Asia, and Australia and New Zealand

in Australasia, all self-governing Dominions of the British Empire, see above, §§ 94a and 94b.

² But see above, § 28 (5) and § 103.

§ 111. In Asia ¹ there are :

Asiatic
States.

Full sovereign States :

Great Power : Japan.

Smaller States : Afghanistan.² Persia.²

China.² Siam.²

Hedjaz.

Half sovereign States :

Mongolia.² Thibet.²

The position of the territories formerly part of the Russian Empire remains unsettled. The British Government has recognised the Governments of Azerbaijan, the Erivan Republic of Armenia ³ and Georgia as *de facto* Governments, but these territories have not so far been recognised as independent States.

¹ As to the position of Canada and Newfoundland in North America, South Africa in Africa, India in Asia, and Australia and New Zealand in Australasia, all self-governing Dominions of the British Empire, see above, §§ 94*a* and 94*b*.

² But see above, § 28 (5) and § 103.

³ It has been officially stated that by the Treaty of Peace with Turkey a new State of Armenia, with frontiers at present undetermined but presumably including the Erivan

Republic, is to be provisionally recognised as an independent State subject to the rendering of administrative advice and assistance by a Mandatory in accordance with Article 22 of the Covenant of the League of Nations (see below, § 167*p*, p. 287), and that Syria and Mesopotamia are to be established as States of the same kind. Provision is also to be made for the future status of Palestine.

CHAPTER II

POSITION OF THE STATES WITHIN THE FAMILY OF NATIONS

I

INTERNATIONAL PERSONALITY

Vattel, i. §§ 13-25—Hall, § 7—Westlake, i. pp. 306-309—Lawrence, § 57—Phillimore, i. §§ 144-147—Twiss, i. § 106—Wheaton, § 60—Hershey, No. 131—Moore, i. § 23—Bluntschli, §§ 64-81—Hartmann, § 15—Heffter, § 26—Holtzendorff in *Holtzendorff*, ii. pp. 47-51—Gareis, §§ 24-25—Liszt, § 7—Ullmann, § 38—Bonfils, Nos. 235-241—Despagnet, Nos. 165-166—Nys, ii. pp. 216-222—Pradier-Fodéré, i. Nos. 165-195—Mérignhac, i. pp. 233-239—Rivier, i. § 19—Fiore, i. Nos. 367-371—Martens, i. § 72—Fontenay, *Des Droits et des Devoirs des États entre eux* (1888)—Pillet in *R.G.*, v. (1898), pp. 66 and 236, vi. (1899), p. 503—Cavaglieri, *I Diritti fondamentali degli Stati nella Società internazionale* (1906)—Brown in *A.J.*, ix. (1913), pp. 305-335.

The so-called Fundamental Rights.

§ 112. Until the last two decades of the nineteenth century all jurists agreed that membership of the Family of Nations bestowed so-called fundamental rights on States. Such rights were chiefly enumerated as the rights of existence, of self-preservation, of equality, of independence, of territorial supremacy, of holding and acquiring territory, of intercourse, and of good name and reputation. It was and is maintained that these fundamental rights are a matter of course and self-evident, since the Family of Nations consists of sovereign States. But no unanimity exists with regard to the number, the appellation, and the contents of these alleged fundamental rights. Thus, to mention a modern

French writer, Pillet,¹ although he rejects all the fundamental rights which are usually enumerated, asserts the existence of one fundamental right, namely, the right of every State to demand respect for its sovereignty. Again, to mention a modern German writer, Kaufmann² asserts that the right of self-preservation is the only fundamental right. A great confusion³ exists, and hardly two text-book writers agree in details with regard to the fundamental rights. This condition of things has led to a searching criticism of the whole matter, and several writers⁴ have in consequence thereof

¹ See *R.G.*, v. (1898), pp. 66 and 236, and *R.G.*, vi. (1899), p. 503.

² See Kaufmann, *Das Wesen des Völkerrechts und die Clausula rebus sic stantibus* (1911), pp. 106-204.

³ The 'Declaration of the Rights and Duties of Nations' proclaimed by the American Institute of International Law in 1916, at its first meeting at Washington, has in no way improved matters. The following is the text of this declaration:—

I. Every nation has the right to exist, and to protect and to conserve its existence; but this right neither implies the right nor justifies the act of the State to protect itself or to conserve its existence by the commission of unlawful acts against innocent and unoffending States.

II. Every nation has the right to independence in the sense that it has a right to the pursuit of happiness, and is free to develop itself without interference or control from other States, provided that in so doing it does not interfere with or violate the rights of other States.

III. Every nation is in law and before law the equal of every other nation belonging to the Society of Nations, and all nations have the right to claim and, according to the Declaration of Independence of the United States, 'to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them.'

IV. Every nation has the right to territory within defined boundaries

and to exercise exclusive jurisdiction over its territory, and all persons, whether native or foreign, found therein.

V. Every nation entitled to a right by the Law of Nations is entitled to have that right respected and protected by all other nations, for right and duty are correlative, and the right of one is the duty of all to observe.

VI. International Law is at one and the same time both national and international: national in the sense that it is the law of the land and applicable as such to the decision of all questions involving its principles; international in the sense that it is the law of the Society of Nations and applicable as such to all questions between and among the members of the Society of Nations involving its principles.

See *A.J.*, x. (1916), p. 212, and the Report.

⁴ See Stoerk in Holtzendorff's *Encyklopädie der Rechtswissenschaft*, 5th ed. (1890), p. 1291; Jellinek, *System der subjectiven öffentlichen Rechte* (1892), p. 302; Heilborn, *System*, p. 279, and others. The arguments of these writers have met, however, considerable resistance, and the existence of fundamental rights of States is emphatically defended by other writers. See, for instance, Pillet, *l.c.*, Liszt, § 7, and Gareis, §§ 24 and 25. Westlake, i. p. 306, is in the ranks of those writers who deny the existence of fundamental rights.

asked that the fundamental rights of States should totally disappear from the treatises on the Law of Nations. I certainly agree with this. Yet it must be taken into consideration that under the wrong heading of fundamental rights a good many correct statements have been made for hundreds of years, and that numerous real rights and duties are customarily recognised which are derived from the very membership of the Family of Nations. They are rights and duties which do not rise from international treaties between a multitude of States, but which the States customarily hold as International Persons, and which they grant and receive reciprocally as members of the Family of Nations. They are rights and duties connected with the position of the States within the Family of Nations, and it is therefore only adequate to their importance to discuss them in a special chapter under that heading.

Inter-
national
Person-
ality a
Body of
Qualities.

§ 113. International Personality is the term which characterises fitly the position of the States within the Family of Nations, since a State acquires International Personality through its recognition as a member. What it really means can be ascertained by going back to the basis¹ of the Law of Nations. Such basis is the common consent of the States that a body of legal rules shall regulate their intercourse with one another. Now a legally regulated intercourse between sovereign States is only possible under the condition that a certain liberty of action is granted to every State, and that, on the other hand, every State consents to a certain restriction of action in the interest of the liberty of action granted to every other State. A State that enters into the Family of Nations retains the natural liberty of action due to it in consequence of its sovereignty, but at the same time takes over the obligation to exercise self-restraint and to restrict its liberty of action in the

¹ See above, § 12.

interest of that of other States. In entering into the Family of Nations a State comes as an equal to equals;¹ it demands that certain consideration be paid to its dignity, the retention of its independence, of its territorial and its personal supremacy. Recognition of a State as a member of the Family of Nations involves recognition of such State's equality, dignity, independence, and territorial and personal supremacy. But the recognised State recognises in turn the same qualities in other members of that family, and thereby it undertakes responsibility for violations committed by it. All these qualities constitute as a body the International Personality of a State, and International Personality may therefore be said to be the fact, involved in the very membership of the Family of Nations, that equality, dignity, independence, territorial and personal supremacy, and the responsibility of every State are recognised by every other State. The States are International Persons because they recognise these qualities in one another, and recognise their responsibility for violations of these qualities.

§ 114. But the position of the States within the Family of Nations is not exclusively characterised by these qualities. The States make a community because there is constant intercourse between them. Intercourse is therefore a condition without which the Family of Nations would not and could not exist. Again, there are exceptions to the protection of the qualities which constitute the International Personality of the States, and these exceptions are likewise characteristic of the position of the States within the Family of Nations. Thus, in time of war belligerents have a right to violate one another's Personality in many ways; even annihilation of the vanquished State, through subjugation after conquest, is allowed. Thus, further, in time of

Other
Charac-
teristics of
the Posi-
tion of the
States
within the
Family of
Nations.

¹ See above, § 14.

peace as well as in time of war, such violations of the Personality of other States are excused as are committed in self-preservation or through justified intervention. And, finally, jurisdiction is also important for the position of the States within the Family of Nations. Intercourse, self-preservation, intervention, and jurisdiction must, therefore, likewise be discussed in this chapter.

II

EQUALITY, RANK, AND TITLES

Vattel, ii. §§ 35-48—Westlake, i. pp. 321-325—Lawrence, §§ 112-119—Phillimore, i. § 147, ii. §§ 27-43—Twiss, i. § 12—Halleck, i. pp. 125-155—Taylor, § 282—Wheaton, §§ 152-159—Hershey, No. 146—Moore, i. § 24—Bluntschli, §§ 81-94—Hartmann, § 14—Heffter, §§ 27-28—Holtzendorff in *Holtzendorff*, ii. pp. 11-13—Ullmann, §§ 36 and 37—Bonfils, Nos. 272-278—Despagnet, Nos. 167-171—Pradier-Fodéré, ii. Nos. 484-594—Mérignhac, i. pp. 310-320—Rivier, i. § 9—Nys, ii. pp. 235-255—Calvo, i. §§ 210-259—Fiore, i. Nos. 428-451, and *Code*, Nos. 393-426—Martens, i. §§ 70-71—Lawrence, *Essays*, pp. 191-213—Westlake, *Papers*, pp. 86-109—Huber, *Die Gleichheit der Staaten* (1909)—Schücking, *Der Staatenverband der Haager Konferenzen* (1912), pp. 216-229—Satow, *Diplomatic Practice*, i. §§ 21-88—Nys and Streit in *R.I.*, 2nd Ser. i. (1899), pp. 273-313, and ii. (1900), pp. 5-25—Hicks in *A.J.*, ii. (1908), pp. 530-561.

Legal
Equality
of States.

§ 115. The equality before International Law of all member-States of the Family of Nations is an invariable quality derived from their International Personality.¹ Whatever inequality may exist between States as regards their size, population, power, degree of civilisation, wealth, and other qualities, they are nevertheless equals as International Persons. This legal equality has three important consequences :

The first is that, whenever a question arises which has to be settled by the consent of the members of the Family of Nations, every State has a right to a vote, but to one vote only.

¹ See above, §§ 14 and 113.

The second consequence is that legally—although not politically—the vote of the weakest and smallest State has quite as much weight as the vote of the largest and most powerful. Therefore any alteration of an existing rule or creation of a new rule of International Law by a law-making treaty has legal validity for the signatory Powers and those only who later on accede expressly or submit to it tacitly through custom.

The third consequence is that—according to the rule *par in parem non habet imperium*—no State can claim jurisdiction over another full sovereign State. Therefore, although foreign States can sue in foreign courts,¹ they cannot as a rule be sued² there, unless they voluntarily accept³ the jurisdiction of the court concerned, or have submitted themselves to such jurisdiction by suing⁴ in such foreign court.⁵

To the rule of equality there are three exceptions:

First, such States as can for some purposes⁶ only be considered International Persons, are not equals of the full members of the Family of Nations.

Secondly, States under suzerainty and under protectorate, which are half sovereign and under the

¹ See Phillimore, ii. § 113 A; Young, *Foreign Companies and other Corporations* (1912), pp. 300-309; Nys, ii. pp. 340-348; Loening, *Die Gerichtsbarkeit über fremde Staaten und Souveräne* (1903); Praag, Nos. 164-190; and the following cases: *The United States v. Wagner*, (1867) L.R. 2 Ch. App. 582; *The Republic of Mexico v. Francisco de Arrangoiz, and Others*, (1855) 11 Howard's Practice Reports 1 (quoted by Scott, *Cases on International Law* (1902), p. 170); *The Sapphire*, (1870) 11 Wallace 164. See also below, § 348.

² See *De Haber v. The Queen of Portugal*, (1851) 17 Q.B. 171 and 196, and *Vavasseur v. Krupp*, (1878) L.R. 9 Ch. D. 351.

³ See *Prieoleau v. The United States and Andrew Johnson*, (1866) L.R. 2 Equity 659.

⁴ Provided the cross-suit is really

connected with the claim in the action. As regards the German case of *Hellfeld v. The Russian Government*, see Kohler in *Z. V.*, iv. (1910), pp. 309-333; the opinions of Laband, Meili, and Seuffert, *ibid.*, pp. 334-448; Baty in the *Law Magazine and Review*, xxxv. (1909-1910), p. 207; Wolfman in *A.J.*, iv. (1910), pp. 373-383.

⁵ Quite exceptional cases are created by Article 281 of the Treaty of Peace with Germany, Article 233 of the Treaty of Peace with Austria, and Article 161 of the Treaty of Peace with Bulgaria, which provide that if the German or Austrian or Bulgarian Governments engage in international trade, they shall not in respect thereof have any rights, privileges, or immunities of sovereignty.

⁶ See above, § 103.

guardianship¹ of other States with regard to the management of external affairs, are not equals of States which enjoy full sovereignty.

Thirdly, the part sovereign member-States of a Federal State are not equals of full sovereign States.

It is, however, quite impossible to lay down a hard and fast general rule concerning the amount of inequality between the equal and the unequal States, as everything depends upon the circumstances and conditions of the special case. Thus, for instance, such States as can only for some parts be considered to be International Persons, and, further, half and part sovereign States, have not always a right to a vote when a question arises which has to be settled by the consent of the members of the Family of Nations. Again, a State under the suzerainty of another, and also a State under the protectorate of another, may in some cases be bound by the vote of the suzerain and the protecting State respectively. Further, a Federal State may for some matters have jurisdiction over its part sovereign member-States, as may a suzerain State over its vassal.

Political
Hegemony of
Great
Powers.

§ 116. Legal equality must not be confounded with political equality. The enormous differences between States as regards their strength are the result of a natural inequality which, apart from rank and titles, finds its expression in the province of policy. Politically, States are in no manner equals, as there is a difference between the Great Powers and others. All arrangements made by the body of the Great Powers naturally gain the consent of the minor States, and the body of the Great Powers in Europe was therefore in the period before the World War called the European Concert. There were then eight Great Powers—Great Britain, Austria-Hungary, France, Germany, Italy, and Russia

¹ See above, §§ 91 and 93.

in Europe, and the United States of America and Japan outside Europe. But owing to the defeat of the Central Empires and the breakdown of Russia, there are at present only five Great Powers, namely, the British Empire, France and Italy, together with the United States in America, and Japan in Asia; these are the States which are called in the Treaties of Peace the 'Principal Allied and Associated Powers.' The Great Powers are the leaders of the Family of Nations, and every advance of the Law of Nations during the past has been the result of their political hegemony, although the initiative towards progress was frequently taken by a minor Power.

But, however important the position and the influence of the Great Powers may be, they are by no means derived from a legal basis or rule.¹ It is nothing else than powerful example which makes the smaller States agree to the arrangements of the Great Powers. Great Powers do not enjoy any superiority of right, but only a priority of action. Nor has a State the character of a Great Power by law. It is nothing else than actual size, strength, and economic influence which make a State a Great Power. Changes, therefore, often take place. Whereas at the time of the Vienna Congress in 1815 eight States—namely, Great Britain, Austria, France, Portugal, Prussia, Spain, Sweden, and Russia—were still considered Great Powers, their number decreased soon to five, when Portugal, Spain, and Sweden lost that character. But the so-called Pentarchy of the remaining Great Powers turned into a Hexarchy after the unification of Italy, because the latter became at once a Great Power. The United States rose as a Great Power out of the civil war in 1865, and Japan

¹ This is, however, maintained by a few writers. See, for instance, Lorimer, i. p. 170; Lawrence, §§ 113 and 114; Westlake, i. pp. 321-323,

and Pitt Cobbett, *Cases and Opinions on International Law*, 2nd ed. vol. i. (1909), p. 50.

did the same out of the war with China in 1895. On the other hand, in consequence of the World War, Austria, Germany, and Russia ceased to be Great Powers, although Germany, as well as Russia, may in the course of time again become Great Powers. It is a question of political and economic influence, and not of law, whether a State is or is not a Great Power. Whatever large-sized State with a large population gains such strength and economic power that its political influence must be reckoned with by the other Great Powers, becomes a Great Power itself.¹ Nor has the establishment of the League of Nations with the preponderance of the Great Powers within its Council turned their political into a legal hegemony, because this preponderance is only the fruit of their political influence.

Rank of
States.

§ 117. Although the States are equals as International Persons, they are nevertheless not equals as regards rank. The differences as regards rank are recognised by International Law, but the legal equality of States within the Family of Nations is thereby as little affected as the legal equality of the citizens is affected within a modern State where differences in rank and titles of the citizens are recognised by Municipal Law. The vote of a State of lower rank has legally as much weight as that of a State of higher rank. And the difference in rank nowadays no longer plays such an important part as in the past, when questions of etiquette gave occasion for much dispute. It was in the six-

¹ In contradistinction to the generally recognised political hegemony of the Great Powers, Lawrence (§§ 113 and 114) and Taylor (§§ 415 and 424) maintain that the position of the Great Powers is *legally* superior to that of the smaller States, being a 'Primacy' or 'Overlordship.' This doctrine, which professedly seeks to abolish the universally recognised rule of the equality of States, has no sound basis, and confounds political

with legal inequality. I cannot agree with Lawrence when he says (§ 114, p. 276): '... in a system of rules depending, like International Law, for their validity on general consent, what is political is legal also, if it is generally accepted and acted on.' The Great Powers are *de facto*, by the smaller States, recognised as political leaders, but this recognition does not involve recognition of legal superiority.

teenth and seventeenth centuries that the rank of the different States was zealously discussed under the heading of *droit de préséance* or *questions de préséance*. The Congress at Vienna of 1815 intended to establish an order of precedence within the Family of Nations, but dropped this scheme on account of practical difficulties. Thus the matter is entirely based on custom, which recognises the following three rules :

(1) The States are divided into two classes—namely, States with, and States without, royal honours. To the first class belong Empires and Kingdoms ; to it belong Grand Duchies ; to this class belong also the great Republics such as France, the United States of America, Switzerland, the South American Republics, and others. All other States belong to the second class. The Holy See is treated as though she were a State with royal honours. States with royal honours have exclusively the right to send and receive diplomatic envoys of the first class¹—namely, ambassadors ; and their monarchs address one another as ‘ brothers ’ in their official letters. States with royal honours always precede other States.

(2) Full sovereign States always precede those under suzerainty or protectorate.

(3) Among themselves States of the same rank do not precede one another. Empires do not precede kingdoms, and since the time of Cromwell and the first French Republic monarchies do not precede republics. But the Roman Catholic States always concede precedence to the Holy See, and the monarchs recognise among themselves a difference with regard to ceremonies between emperors and kings on the one hand, and, on the other, grand dukes and other monarchs.

§ 118. To avoid questions of precedence, on signing a treaty, States of the same rank often observe a conventional usage which is called the ‘ Alternat.’ According to

The
‘ Alter-
nat.’

¹ See below, § 365.

that usage the signatures of the signatory States of a treaty alternate in a regular order or in one determined by lot, the representative of each State signing first the copy which belongs to his State. But sometimes that order is not observed, and the States sign either in the alphabetical order of their names in French or in no order at all (*pêle-mêle*).

Titles of
States.

§ 119. At the present time, States, save in a few exceptional instances, have no titles, although formerly such titles did exist. Thus the former Republic of Venice, as well as that of Genoa, was addressed as 'Serene Republic,' and up to the present day the Republic of San Marino¹ is addressed as 'Most Serene Republic.' Nowadays the titles of the heads of monarchical States are in so far of importance to International Law as they are connected with the rank of the respective States. Since States are sovereign, they can bestow any titles they like on their heads. Thus, according to the German Constitution of 1871, the Kings of Prussia had the title 'German Emperor'; the English monarchs have since 1877 borne the title 'Emperor or Empress of India'; the Prince of Roumania assumed in 1881, that of Serbia in 1882, that of Bulgaria in 1908, and that of Montenegro in 1910, the title 'King.' But no foreign State is obliged to recognise such a new title, especially when a higher rank would accrue to the State concerned in consequence of such a new title for its head. In practice such recognition will regularly be given when the new title really corresponds with the size and the importance of the State.² Roumania, Serbia, Bulgaria, and Montenegro had therefore no difficulty in obtaining recognition as Kingdoms.

¹ See Treaty Ser. (1900), No. 9.

² History, however, reports several cases where recognition was withheld for a long time. Thus the title 'Emperor of Russia,' assumed by Peter the Great in 1701, was not

recognised by France till 1745, by Spain till 1759, nor by Poland till 1764. And the Pope did not recognise the kingly title of Prussia, assumed in 1701, till 1786.

With the titles of the heads of States are connected predicates. Emperors and Kings have the predicate 'Majesty,' 'Grand Dukes' have the predicate 'Royal Highness,' Dukes that of 'Highness,' and other monarchs that of 'Serene Highness.' The Pope is addressed as 'Holiness' (*Sanctitas*). Not to be confounded with these predicates, which are recognised by the Law of Nations, are predicates which originally were bestowed on monarchs by the Pope and which have no importance for the Law of Nations. Thus the Kings of France called themselves *Rex Christianissimus* or 'First-born Son of the Church,' the Kings of Spain have called themselves since 1496 *Rex Catholicus*, the Kings of England since 1521 *Defensor Fidei*, the Kings of Portugal since 1748 *Rex Fidelissimus*, and the Kings of Hungary called themselves from 1758 onwards *Rex Apostolicus*.

III

DIGNITY

Vattel, ii. §§ 35-48—Lawrence, § 120—Phillimore, ii. §§ 27-43—Halleck, i. pp. 137-152—Taylor, § 162—Wheaton, § 160—Hershey, No. 147—Bluntschli, §§ 82-83—Hartmann, § 15—Heffter, §§ 32, 102, 103—Holtzendorff in *Holtzendorff*, ii. pp. 64-69—Ullmann, § 38—Bonfils, Nos. 279-284—Despagnet, Nos. 184-186—Pradier-Fodéré, ii. Nos. 451-483—Rivier, i. pp. 260-262—Nys, ii. pp. 254-255—Calvo, iii. §§ 1300-1302—Fiore, i. Nos. 439-451—Martens, i. § 78.

§ 120. The majority of text-book writers maintain that there is a fundamental right of reputation and of good name belonging to every State. Such a right, however, does not exist, because no duty corresponding to it can be traced within the Law of Nations. Indeed, the reputation of a State depends just as much upon behaviour as that of every citizen within its boundaries.

Dignity a
Quality.

A State which has a corrupt Government and behaves unfairly and perfidiously in its intercourse with other States will be looked down upon and despised, whereas a State which has an uncorrupt Government and behaves fairly and justly in its international dealings will be highly esteemed. No law can give a good name and reputation to a rogue, and the Law of Nations does not and cannot give a right to reputation and good name to such a State as has not acquired them through its attitude. There are some States—*nomina sunt odiosa!*—which indeed justly possess a bad reputation.

On the other hand, a State as a member of the Family of Nations possesses dignity as an International Person. Dignity is a quality recognised by other States, and it adheres to a State from the moment of its recognition till the moment of its extinction, whatever behaviour it displays. Just as the dignity of every citizen within a State commands a certain amount of consideration on the part of fellow-citizens, so the dignity of a State commands a certain amount of consideration on the part of other States, since otherwise the different States could not live peaceably in the community which is called the Family of Nations.

Consequences of
the Dignity of
States.

§ 121. Since dignity is a recognised quality of States as International Persons, all members of the Family of Nations grant reciprocally to one another by custom certain rights and ceremonial privileges. These are chiefly the right to demand—that their heads shall not be libelled and slandered; that their heads and likewise their diplomatic envoys shall be granted extraterritoriality and inviolability when abroad, and at home and abroad in the official intercourse with representatives of foreign States shall be granted certain titles; that their men-of-war shall be granted extraterritoriality when in foreign waters; that their symbols of authority, such as flags and coats of arms, shall not be

used improperly and shall not be treated with disrespect on the part of other States. Every State must not only itself comply with the duties corresponding to these rights enjoyed by other States, but must also prevent its subjects from such acts as violate the dignity of foreign States, and must punish them for acts of that kind which it could not prevent. The Municipal Laws of all States must therefore provide for the punishment of those who commit offences against the dignity of foreign States,¹ and if the Criminal Law of the land does not contain such provisions, this is no excuse for failure by the State concerned to punish offenders. But it must be emphasised that a State must prevent and punish such acts only as really violate the dignity of a foreign State. Mere criticism of policy, historical verdicts concerning the attitude of States and their rulers, utterances of moral indignation condemning immoral acts of foreign Governments and their monarchs need neither be suppressed nor punished.

§ 122. Connected with the dignity of States are the maritime ceremonials between vessels, and between vessels and forts, which belong to different States. In former times discord and jealousy existed between the States regarding such ceremonials, since they were looked upon as means of keeping up the superiority of one State over another. Nowadays, so far as the open sea is concerned, they are considered as mere acts of courtesy recognising the dignity of States. They are the outcome of international usages, and not of International Law, in honour of the national flags. They are carried out by dipping flags or striking sails or

Maritime
Cere-
monials.

¹ According to the Criminal Law of England, 'everyone is guilty of a misdemeanour who publishes any libel tending to degrade, revile, or expose to hatred and contempt any foreign prince or potentate, ambassador or other foreign dignitary,

with intent to disturb peace and friendship between the United Kingdom and the country to which any such person belongs.' See Stephen, *A Digest of the Criminal Law*, Article 103.

firing guns.¹ But so far as the territorial maritime belt is concerned, littoral States can make laws concerning maritime ceremonials to be observed by foreign merchantmen.²

IV

INDEPENDENCE AND TERRITORIAL AND PERSONAL SUPREMACY

Vattel, i. *Préliminaires*, §§ 15-17—Hall, § 10—Westlake, i. pp. 321-325—Lawrence, §§ 58-61—Phillimore, i. §§ 144-149—Twiss, i. § 20—Halleck, i. pp. 100-124—Taylor, § 160—Wheaton, §§ 72-75—Hershey, Nos. 133-134—Bluntschli, §§ 64-69—Hartmann, § 15—Heffter, §§ 29 and 31—Holtendorff in *Holtendorff*, ii. pp. 56-60—Gareis, §§ 25-26—Ullmann, § 38—Bonfils, Nos. 253-271—Despagnet, Nos. 187-189—Mérignhac, i. pp. 258-267—Pradier-Fodéré, i. Nos. 287-332—Rivier, i. § 21—Nys, ii. pp. 223-226—Calvo, i. §§ 107-109—Fiore, i. Nos. 372-427, and *Code*, Nos. 185-392—Martens, i. §§ 74 and 75—Westlake, *Papers*, pp. 86-101.

Independence and Territorial as well as Personal Supremacy as Aspects of Sovereignty.

§ 123. Sovereignty as supreme authority, which is independent of any other earthly authority, may be said to have different aspects. As excluding dependence from any other authority, and in particular from the authority of another State, sovereignty is *independence*. It is *external* independence with regard to the liberty of action outside its borders in the intercourse with other States which a State enjoys. It is *internal* independence with regard to the liberty of action of a State inside its borders. As comprising the power of a State to exercise supreme authority over all persons and things within its territory, sovereignty is *territorial* supremacy (*dominium, territorial sovereignty*). As comprising the power of a State to exercise supreme authority over its citizens at home and abroad, sovereignty is *personal* supremacy (*imperium, political sovereignty*).

¹ See Halleck, i. pp. 133-152, where the matter is treated with all details. See also below, § 257.

² See below, § 187.

For these reasons a State as an International Person possesses independence and territorial and personal supremacy. These three qualities are nothing else than three aspects of the very same sovereignty of a State, and there is no sharp boundary line between them. The distinction is apparent and useful, although internal independence is nothing else than sovereignty comprising territorial supremacy, but viewed from a different point of view.

§ 124. Independence and territorial as well as personal supremacy are not rights, but recognised and therefore protected qualities of States as International Persons. The protection granted to these qualities by the Law of Nations finds its expression in the right of every State to demand that other States abstain themselves, and prevent their agents and subjects, from committing any act which constitutes a violation of its independence or its territorial or personal supremacy.

Consequences of Independence and Territorial and Personal Supremacy.

In consequence of its external independence, a State can manage its international affairs according to discretion, especially enter into alliances and conclude other treaties, send and receive diplomatic envoys, acquire and cede territory, make war and peace.

In consequence of its internal independence and territorial supremacy, a State can adopt any constitution it likes, arrange its administration in a way it thinks fit, enact such laws as it pleases, organise its forces on land and sea, build and pull down fortresses, adopt any commercial policy it likes, and so on. According to the rule, *quidquid est in territorio est etiam de territorio*, all individuals and all property within the territory of a State are under its dominion and sway, and even foreign individuals and property fall at once under the territorial supremacy of a State when they cross its frontier. Aliens residing in a State can therefore be compelled to pay rates and taxes, and to

serve in the police under the same conditions as citizens for the purpose of maintaining order and safety. But aliens may be expelled, or not received at all. On the other hand, hospitality may be granted to them whatever act they have committed abroad, provided they abstain from making the hospitable territory the basis for attempts against a foreign State. And a State can through naturalisation adopt foreign subjects residing on its territory without the consent of the home State, provided the individuals themselves give their consent.

In consequence of its personal supremacy, a State can treat its subjects according to discretion, and it retains its power even over such subjects as emigrate without thereby losing their citizenship. A State may therefore command its citizens abroad to come home and fulfil their military service, may require them to pay rates and taxes for the support of the home finances, may ask them to comply with certain conditions in case they desire marriages concluded abroad or wills made abroad to be recognised by the home authorities, and can punish them on their return for crimes they have committed abroad.

Violations of Independence and Territorial and Personal Supremacy.

§ 125. The duty of every State itself to abstain, and to prevent its agents and subjects, from committing any act which constitutes a violation¹ of another State's independence or territorial or personal supremacy is correlative to the corresponding right possessed by the other State. It is impossible to enumerate all such actions as might constitute a violation of this duty. But it is of value to give some illustrative examples. Thus, in the interest of the independence of other States, a State is not allowed to interfere in the management of their international affairs, nor to prevent them from doing or to compel them to do certain acts in their international intercourse. Further,

¹ See below, § 155.

in the interest of the territorial supremacy of other States, a State is not allowed to send its troops, its men-of-war, or its police forces into or through foreign territory, or to exercise an act of administration or jurisdiction on foreign territory, without permission.¹ Again, in the interest of the personal supremacy of other States, a State is not allowed to naturalise aliens residing on its territory without their consent,² nor to prevent them from returning home for the purpose of fulfilling military service or from paying rates and taxes to their home State, nor to incite citizens of foreign States to emigration.

§ 126. Independence is not boundless liberty for a State to do what it likes without any restriction whatever. The mere fact that a State is a member of the Family of Nations restricts its liberty of action with regard to other States, because it is bound not to intervene in the affairs of other States. And it is generally admitted that a State can through conventions, such as a treaty of alliance or neutrality and the like, enter into many obligations which hamper it more or less in the management of its international affairs. Independence is a question of degree, and it is therefore also a question of degree whether the independence of a State is destroyed or not by certain restrictions. Thus it is generally admitted that States under suzerainty or under protectorate are so much restricted that they are not fully independent, but half sovereign. And the same is the case with the member-States of a Federal State which are part sovereign. On the other hand, the restrictions connected with the neutralisation of States

Restrictions upon Independence.

¹ But neighbouring States very often give such permission to one another. Switzerland, for instance, allows German custom-house officers to be stationed on two railway stations of Basle for the purpose of examining the luggage of travellers

from Basle to Germany.

² See, however, below (§ 299), where the fact is stated that some States naturalise an alien through the very fact of his taking domicile on their territory.

do not, according to the correct opinion,¹ destroy their independence, although they cannot make war except in self-defence, cannot conclude alliances, and are in other ways hampered in their liberty of action.

From a political and a legal point of view it is of great importance that the States imposing and those accepting restrictions upon independence should be clear in their intentions. For the question may arise whether these restrictions make the State concerned a dependent one.

Thus through Article 4 of the Convention of London of 1884, between Great Britain and the former South African Republic, stipulating that the latter should not conclude any treaty with any foreign State, the Orange Free State excepted, without approval on the part of Great Britain, the Republic was so much restricted that Great Britain considered herself justified in defending the opinion that the Republic was not an independent State, although the Republic itself and many writers were of a different opinion.²

Thus, to give another example, through Article 1 of the Treaty of Havana³ of May 22, 1903, between the United States of America and Cuba, stipulating that Cuba shall never enter into any such treaty with a foreign Power as will impair, or tend to impair, the independence of Cuba, and shall abstain from other acts, the Republic of Cuba is so much restricted that some writers maintain—wrongly, I believe—that Cuba is under an American protectorate and only a half sovereign State.⁴

¹ See above, § 97.

² It is of interest to state the fact that, before the last phase of the conflict between Great Britain and the Republic, influential Continental writers stated the suzerainty of Great Britain over the Republic. See Rivier, i. p. 89, and Holtzendorff in *Holtzendorff*, ii. p. 115. Westlake, *Papers*, pp. 419-460, gives an

independent analysis of the relations between Great Britain and the Republic.

³ See Martens, *N.R.G.*, 2nd Ser. xxxii. p. 79.

⁴ As regards the international position of Cuba, see Whitcomb, *La Situation internationale de Cuba* (1905), and Hershey, p. 108, n. 28.

Again, the Republic of Panama is, by the Hay-Varilla Treaty of Washington ¹ of 1903, likewise burdened with some restrictions in favour of the United States, but here, too, it would be wrong to maintain that Panama is under an American protectorate. Restrictions in favour of the United States, imposed upon San Domingo by a treaty of February 8, 1907,² and upon Haiti by a treaty of September 16, 1915,³ raise similar questions.

§ 127. Just like independence, territorial supremacy does not give a boundless liberty of action. Thus, by customary International Law every State has a right to demand that its merchantmen can pass through the maritime belt of other States. Thus, further, navigation on so-called international rivers in Europe must be open to merchantmen of all States. Thus, thirdly, foreign monarchs and envoys, foreign men-of-war, and foreign armed forces must be granted extraterritoriality. Thus, fourthly, through the right of protection over citizens abroad, which is held by every State according to customary International Law, a State cannot treat foreign citizens passing through or residing on its territory arbitrarily according to discretion as it might treat its own subjects; it cannot, for instance, compel them to serve⁴ in its army or navy. Thus, fifthly, a State, in spite of its territorial supremacy, is not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State—for instance, to stop or to

Restrictions upon Territorial Supremacy.

¹ See Martens, *N.R.G.*, 2nd Ser. xxxi. p. 599.

² *A.J.*, i. (1907), Supplement, p. 23. See also *A.J.*, xi. (1917), p. 394.

³ *A.J.*, x. (1916), Supplement, p. 234.

⁴ Great Britain would seem to uphold an exception to this rule, for Lord Reay, one of her delegates, declared—see *Deuxième Conférence internationale de la Paix, Actes et Documents*, vol. iii. p. 41—the fol-

lowing at the second Hague Peace Conference of 1907: 'Nous reconnaissons qu'en règle générale le neutre est exempt de tout service militaire dans l'État où il réside. Cependant dans les colonies britanniques et, dans une certaine mesure, dans tous les pays en voie de formation, la situation est tout autre et la population toute entière, sans distinction de nationalité, peut être appelée sous les armes pour défendre leurs foyers menacés.'

divert the flow of a river which runs from its own into neighbouring territory.¹ Thus, to give another and sixth example, a State is not allowed to permit on its territory a conspiracy or the preparation of a hostile expedition² against another country.

In contradistinction to these restrictions by the customary Law of Nations, there are obligations of many a kind which a State can assume through treaties, without thereby losing its internal independence and territorial supremacy. Thus France by three consecutive treaties of peace—namely, that of Utrecht of 1713, that of Aix-la-Chapelle of 1748, and that of Paris of 1763—entered into the obligation to pull down and not to rebuild the fortifications of Dunkirk.³ Again, Napoleon I. imposed after the Peace of Tilsit of 1807 upon Prussia the restriction⁴ not to keep more than 42,000 men under arms during ten years from January 1, 1809; and after the World War the Allies imposed upon Germany the restriction not to keep more than 100,000 men under arms, nor a navy larger than necessary for coast defence and purposes of police, nor any military or naval air forces. Restrictions were likewise placed on the armed forces of Austria and Bulgaria, and will doubtless be placed on those of Hungary and Turkey. Again, Article 29 of the Treaty of Berlin of 1878 imposed upon Montenegro the restriction not to possess a navy.⁵ There is hardly a State in existence which is not in one point or another restricted in its territorial supremacy by treaties with foreign Powers.

¹ See below, § 178a. *A.J.*, vi. (1912), pp. 478-485, gives an interesting account concerning an attempted interference with the natural course of the River Rio Grande.

² See Curtis in *A.J.*, viii. (1914), pp. 1-37, 224-255.

³ This restriction was abolished by Article 17 of the Treaty of Paris of 1783.

⁴ This restriction was agreed upon in secret articles of the Franco-Prussian Convention of September 8, 1808. See Clerq, *Recueil des Traités conclus par la France* (1864), vol. ii. p. 272.

⁵ It is doubtful whether this restriction was still in force at the outbreak of the World War; see below, § 258.

§ 128. Personal supremacy does not give a boundless liberty of action either. Although the citizens of a State remain under its power when abroad, such State is restricted in the exercise of this power with regard to all those matters in which the foreign State on whose territory these citizens reside is competent in consequence of its territorial supremacy. The duty to respect the territorial supremacy of a foreign State must prevent a State from doing all acts which, although they are according to its personal supremacy within its competence, would violate the territorial supremacy of this foreign State. Thus, for instance, a State is prevented from requiring such acts from its citizens abroad as are forbidden to them by the Municipal Law of the land in which they reside, and from ordering them not to commit such acts as they are bound to commit according to the Municipal Law of the land in which they reside.¹

Restrictions upon Personal Supremacy.

But a State may also by treaty obligation be for some parts restricted in its liberty of action with regard to its citizens. Thus Articles 5, 27, 35, and 44 of the Treaty of Berlin of 1878 restricted the personal supremacy of Bulgaria, Montenegro, Serbia, and Roumania in so far as these States were thereby obliged not to impose any religious disabilities on any of their subjects.²

¹ For example, in time of war, a belligerent is not entitled to prohibit one of its nationals, resident in a neutral State under the laws of which debts must be paid, from paying a debt due to a national of the other belligerent.

² See above, § 73. By a treaty concluded on September 10, 1919, between the United States of America, the British Empire, France, Italy and Japan, and the Serb-Croat-Slovene State, the restrictions imposed upon Serbia by Article 35 of the Treaty of Berlin were abrogated,

the Serb-Croat-Slovene State undertaking to assure full and complete protection of life and liberty to all its inhabitants without distinction of birth, nationality, language, race, or religion. (Treaty Ser. (1919), No. 17, Cmd. 461.) As to Roumania, see now the treaty concluded on December 9, 1919, between the Principal Allied and Associated Powers and Roumania (Treaty Ser. (1920), No. 6, Cmd. 588); and as to Bulgaria, the Treaty of Peace with Bulgaria, Articles 49-57. See also below, § 568h.

V

SELF-PRESERVATION

Vattel, ii. §§ 49-53, 119-121—Hall, §§ 8, 83-86—Westlake, i. pp. 312-317—Phillimore, i. §§ 210-220—Twiss, i. §§ 106-112—Halleck, i. pp. 119-124—Taylor, §§ 401-409—Wheaton, §§ 61-62—Hershey, No. 132—Moore, ii. §§ 215-219—Hartmann, § 15—Heffter, § 30—Holtzendorff in *Holtzendorff*, ii. pp. 51-56—Gareis, § 25—Liszt, § 7—Ullmann, § 38—Heilborn, pp. 280-299—Bulmerincq, § 22—Bonfils, Nos. 242-252—Despagnet, Nos. 172-175—Mérignhac, i. pp. 239-245—Pradier-Fodéré, i. Nos. 211-286—Rivier, i. § 20—Nys, ii. pp. 218-221—Calvo, i. §§ 208-209—Fiore, i. Nos. 452-466—Martens, i. § 73—Westlake, *Papers*, pp. 110-125—Cavaretta, *Lo Stato di Necessità nel Diritto internazionale* (1910)—Cybichowski, *Studien zum internationalen Recht* (1912), pp. 21-71—Visscher in *R.G.*, xxiv. (1917), pp. 74-108.

Self-preservation
an Excuse
for Violations.

§ 129. From the earliest time of the existence of the Law of Nations self-preservation was considered sufficient justification for many acts of a State which violate other States. Although, as a rule, all States have mutually to respect one another's personality, and are therefore bound not to violate one another, as an exception, certain violations of another State committed by a State for the purpose of self-preservation are not prohibited by the Law of Nations. Thus, self-preservation is a factor of great importance for the position of the States within the Family of Nations, and most writers maintain that every State has a fundamental right of self-preservation.¹ But nothing of the kind is actually the case, if the real facts of the law are taken into consideration. If every State really had a *right* of self-preservation, all the States would have the duty to admit, suffer, and endure every violation done to one another in self-preservation. But such duty does not exist. On the contrary, although self-preservation is in certain cases an excuse recognised by International

¹ This right was formerly frequently called *Droit de Convenance*, and was said to consist in the right of every State to act in favour of its

interests in case of a conflict between its own and the interests of another State. See Heffter, § 26.

Law, no State is obliged patiently to submit to violations done to it by such other State as acts in self-preservation, but can repulse them. It is a fact that in certain cases violations committed in self-preservation are not prohibited by the Law of Nations. But, nevertheless, they remain violations, may therefore be repulsed, and indemnities¹ may be demanded for damage done. Self-preservation is consequently an excuse, because violations of other States are in certain exceptional cases not prohibited when they are committed for the purpose, and in the interest, of self-preservation, although they need not be patiently suffered and endured by the States concerned.

§ 130. It is frequently maintained that every violation is excused so long as it was caused by the motive of self-preservation; but it becomes more and more recognised that violations of other States in the interest of self-preservation are excused in cases of *necessity* only. Only such acts of violence in the interest of self-preservation are excused as are necessary in self-defence, because otherwise the acting State would have to suffer, or have to continue to suffer, a violation against itself. If an imminent violation, or the continuation of an already commenced violation, can be prevented and redressed otherwise than by a violation of another State on the part of the endangered State, this latter violation is not necessary, and therefore not excused and justified.² When, to give an example, a State is informed that on neighbouring territory a body of armed men is being organised for the purpose of a raid into its territory, and when the danger can be removed through an appeal to the authorities of

What
Acts of
Self-pre-
servation
are
Excused.

¹ See below, § 154 n.

² Mr. Webster, the American Secretary of State, defined the necessity which would be an excuse

as a necessity of self-defence which is 'instant, overwhelming, and leaving no choice of means, and no moment for deliberation.' See Moore, ii, § 217, p. 412.

the neighbouring country, no case of necessity has arisen. But if such an appeal is fruitless or not possible, or if there is danger in delay, a case of necessity arises, and the threatened State is justified in invading the neighbouring country and disarming the intending raiders.

And I believe that the term self-defence must not here be understood in its narrower sense, meaning defence against an act of individuals only, but also in its wider sense meaning the aversion of a disaster caused or threatened by the work of nature. For instance, if a river flowing successively through the territories of two States is provided with a lock in the lower State, and if, through a sudden rise of the upper part of the river, the territory of the upper State be dangerously flooded, and if there be not sufficient time to approach the local authorities, it would be an excusable act on the part of the upper State to send some of its own officials into the lower State to open the lock.

The reason of the thing, of course, makes it necessary for every State to judge for itself whether a case of necessity in self-defence has arisen. On the one hand, therefore, it is impossible to lay down a hard and fast rule regarding the question when a State may or may not have recourse to self-help which violates another State, and on the other hand, the door is open to abuse. Everything depends upon the circumstances and conditions of the special case, and it is therefore of value to give some historical examples.¹

§ 131. After the Peace of Tilsit of 1807, the British Government² was cognisant of a secret article of this treaty, according to which Denmark should, under

¹ See Cybichowski, *op. cit.*, pp. 46-56, where a number of examples are discussed which are not mentioned here.

² I follow Hall's (§ 85) summary of the facts. See also Alison, *His-*

tory of Europe, etc., ed. 1849, viii. pp. 246-267; Holland Rose, *Napoleonic Studies* (1904), pp. 133-152; and the same writer's paper in the *Transactions of the Royal Historical Society*, New Ser. xx. (1906), pp. 61-77.

certain circumstances, be coerced into declaring war against Great Britain, and France should be enabled to seize the Danish fleet so as to make use of it against Great Britain. This plan, when carried out, would have endangered the position of Great Britain, which was then waging war against France. As Denmark was not capable of defending herself against an attack of the French army in North Germany under Bernadotte and Davoust, who had orders to invade Denmark, the British Government requested Denmark to deliver up her fleet to the custody of Great Britain, and promised to restore it after the war. And at the same time the means of defence against French invasion and a guaranty of her whole possessions were offered to Denmark by England. Denmark, however, refused to comply with the British demands; whereupon the British considered a case of necessity in self-defence had arisen, shelled Copenhagen, and seized the Danish fleet.¹

Case of
the
Danish
Fleet
(1807).

§ 132. Another example is supplied by the case of Amelia Island. 'Amelia Island, at the mouth of St. Mary's River, and at that time in Spanish territory, was seized in 1817 by a band of buccaneers, under the direction of an adventurer named M'Gregor, who in the name of the insurgent colonies of Buenos Ayres and Venezuela preyed indiscriminately on the commerce of Spain and of the United States. The Spanish Government not being able or willing to drive them off, and the nuisance being one which required immediate action, President Monroe called his Cabinet together in October 1817, and directed that a vessel of war should proceed to the island and expel the marauders, destroying their works and vessels.'²

Case of
Amelia
Island
(1817).

¹ The action of England in this case, while condemned by most Continental writers, is approved of by many British and American publicists. See, however, Reddie, *Researches*, ii. pp. 37-41, who disapproves of it, as also does Walker, *Science*, p. 138.

² See Wharton, i. § 50a, and Moore, ii. § 216.

Case of
The
Caroline
(1837).

§ 133. In 1837, during the Canadian rebellion, several hundreds of insurgents got hold of Navy Island on the Canadian side of the River Niagara and chartered a vessel, the *Caroline*, to carry supplies from the port of Schlosser, on the American side of the river, to Navy Island, and from there to the insurgents on the mainland of Canada. The Canadian Government, informed of the imminent danger, on December 29, 1837, sent across the Niagara, to the port of Schlosser, a British force which obtained possession of the *Caroline*, seized her arms, set her on fire, and then sent her adrift down the falls of Niagara. During the attack on the *Caroline* two Americans were killed and several others were wounded. The United States complained of this British violation of her territorial supremacy, but Great Britain asserted that her act was necessary in self-preservation, since there was not sufficient time to prevent the imminent invasion of her territory through application to the United States Government. The latter admitted that the act of Great Britain would have been justified if there had really been necessity in self-defence, but denied that, in fact, such necessity existed at the time. Nevertheless, since Great Britain had apologised for the violation of American territorial supremacy, the United States Government did not insist upon further reparation.¹

§ 133a. Although, in October 1915, the United States had recognised General Carranza's Government as the

¹ See Wharton, i. § 50c, Moore, ii. § 217, and Hall, § 84. With the case of *The Caroline* is connected the case of *M'Leod*, which will be discussed below, § 446. Hall, § 86, Martens, i. § 73, and others quote also the case of *The Virginius* (1873) as an example of necessity of self-preservation, but it seems that the Spanish Government did not plead self-preservation but piracy as justification for the capture of the

vessel (see Moore, ii. § 309, pp. 895-903). That a vessel sailing under another State's flag can nevertheless be seized on the high seas in case she is sailing to a port of the capturing State for the purpose of an invasion or bringing material help to insurgents, there is no doubt. No better case of necessity of self-preservation could be given, since the danger is imminent and can be frustrated only by capture of the vessel.

de facto Government of Mexico, Carranza was not able to restore order in the northern districts of Mexico, where General Villa still disputed his authority. On March 9, 1916, Villa, at the head of fifteen hundred men, invaded American territory, and, attacking the city of Columbus, set on fire a number of buildings, and killed several American citizens, before he was driven back into Mexican territory. Since Carranza had not actually succeeded in establishing his authority in North Mexico, President Wilson, on March 10, 1916, sent an expeditionary force into Mexico for the purpose of pursuing Villa, punishing him for the violation of American territorial supremacy,¹ and preventing further attacks. On June 21, 1916, a small part of the American force was attacked at Carrizal, some sixty miles south of the American boundary line, by troops of Carranza, because, in spite of warning, it attempted to pass further eastward into Mexican territory. During the attack twelve Americans were killed and fourteen captured, whereas the Mexican losses were forty-six killed and thirty-nine wounded. President Wilson at once demanded that the American prisoners should be released, and Carranza complied with this demand on June 28. Subsequently an American-Mexican Joint Commission was appointed for the purpose of suggesting measures for the establishment of order on the American-Mexican frontier. But the labour of this Commission was in vain, because Carranza refused to ratify the protocol signed by the Commission. Nevertheless, the American troops were withdrawn in January 1917.

American
Punitive
Expedi-
tion into
Mexico
(1916).

§ 133*b*. In June 1919 another American-Mexican case occurred.² General Villa was still disputing the authority of President Carranza, and some of his soldiers continuously fired into El Paso, a town on the

The Occu-
pation of
Juarez
(1919).

¹ See Scott and Finch in *A.J.*, x. (1916), pp. 337 and 890, and xi. (1917), pp. 399-406.

² *A.J.*, xiii. (1919), p. 557.

American side of the border. To stop the nuisance American troops crossed into Mexican territory, and in order to frustrate the imminent capture of the town of Juarez by General Villa's forces, they occupied the town themselves. As, however, the forces of Villa dispersed in consequence of the American action, the American troops evacuated Juarez shortly afterwards, and President Carranza was notified that the United States expected that he would take all necessary measures to prevent the loss of American lives and destruction of property in consequence of the action of the Villistas.

The Ger-
man Inva-
sion of
Luxem-
burg and
Belgium
(1914).

§ 133c. During the night of August 1, 1914, after having declared war on Russia, but before her declaration of war upon France, Germany marched troops into neutralised Luxemburg and occupied the country. At seven o'clock on the following evening, the German Minister at Brussels presented an ultimatum demanding from Belgium the right of passage for German troops through her territory, but threatening, in the event of refusal, to treat Belgium as an enemy. As Belgium refused to accede to the demands of Germany, German troops invaded Belgium on August 4, and, in spite of the heroic resistance of the Belgian army, almost the whole of Belgium was conquered, and remained under German occupation throughout the World War. Germany justified this violation of the permanent neutrality of Luxemburg, as well as Belgium, by pointing out that she was threatened by a Russian attack on one of her frontiers and by a French attack on another, and that necessity in self-preservation compelled her armies to break through Luxemburg and Belgium for the purpose of aiming a decisive blow at France. Outside Germany, it is almost universally recognised that this plea of necessity in self-preservation was a mere pretext, and was not justified by the facts of the case. Germany did not act in self-preservation at all, because

she was not attacked, and no attack was threatening. It was Germany who declared war upon Russia and France, and she attacked France through Belgium, because she thought in this way she would be able quickly to defeat France, and then to turn all her might against Russia.¹

VI

INTERVENTION

Vattel, ii. §§ 54-62—Hall, §§ 88-95—Westlake, i. pp. 317-321—Lawrence, §§ 62-70—Phillimore, i. §§ 390-415a—Halleck, i. pp. 102-124—Taylor, §§ 410-430—Walker, § 7—Hershey, Nos. 135-145—Wharton, i. §§ 45-72—Moore, vi. §§ 897-926—Wheaton, §§ 63-71—Bluntschli, §§ 474-480—Hartmann, § 17—Heffter, §§ 44-46—Geffcken in *Holtzendorff*, iv. pp. 131-168—Gareis, § 26—Liszt, § 7—Ullmann, §§ 163-164—Bonfils, Nos. 295-323—Despagnet, Nos. 193-216—Mérignhac, i. pp. 284-310—Pradier-Fodéré, i. Nos. 354-441—Rivier, i. § 31—Nys, ii. pp. 226-234, 242-247—Calvo, i. §§ 110-206—Fiore, i. Nos. 561-608, and *Code*, Nos. 548-562—Martens, i. §§ 76-77—Bernard, *On the Principle of Non-intervention* (1860)—Hautefeuille, *Le Principe de Non-intervention* (1863)—Stapleton, *Intervention and Non-intervention, or the Foreign Policy of Great Britain from 1790 to 1865* (1866)—Geffcken, *Das Recht der Intervention* (1887)—Kebedgy, *De l'Intervention* (1890)—Floecker, *De l'Intervention en Droit international* (1896)—Drago, *Cobro coercitivo de Deudas publicas* (1906)—Moulin, *La Doctrine de Drago* (1908)—Wachter, *Die völkerrechtliche Intervention als Mittel der Selbsthilfe* (1911)—Cavaglieri, *L'Intervento nella sua Definizione giuridica* (1913)—Schoenborn, *Die Besetzung von Veracruz* (1914)—Hodges, *The Doctrine of Intervention* (1915).

§ 134. Intervention is dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things. Such intervention can take place by right or without a right, but it always concerns the external independ-

Concep-
tion and
Character
of Inter-
vention.

¹ It is impossible in a general treatise on International Law to enter into a detailed discussion of the German violation of the permanent neutrality of Luxemburg and Belgium, and of the various attempts on the part of numerous German writers, who mostly contradict one another, to justify this

violation. Readers must be referred to the excellent work of Charles De Visscher, *La Belgique et les Juristes allemands* (1916). An English translation of this work was published under the title *Belgium's Case*—where is to be found a good bibliography.

ence or the territorial or personal supremacy of the State concerned, and the whole matter is therefore of great importance for the position of the States within the Family of Nations. That intervention is, as a rule, forbidden by the Law of Nations which protects the International Personality of the States, there is no doubt. On the other hand, there is just as little doubt¹ that this rule has exceptions, for there are interventions which take place by right, and there are others which, although they do not take place by right, are nevertheless admitted by the Law of Nations, and are excused in spite of the violation of the Personality of the respective States which they involve.

Intervention can take place in the external as well as in the internal affairs of a State. It concerns, in the first case, the external independence, and in the second either the territorial or the personal supremacy. But it must be emphasised that intervention proper is always *dictatorial* interference, not interference pure and simple.² Therefore intervention must neither be confounded with good offices, nor with mediation, nor with intercession, nor with co-operation, because none of these imply a *dictatorial* interference. Good offices is the name for such acts of friendly Powers interfering in a conflict between two other States as tend to call negotiations into existence for the peaceable settlement of the conflict, and mediation is the name for the direct conduct on the part of a friendly Power of such negotiations.³ Intercession is the name for interference consisting in friendly advice given or friendly offers made with regard to the domestic affairs of another State. And, lastly, co-operation is the appellation of such inter-

¹ The so-called doctrine of non-intervention as defended by some Italian writers (see Fiore, i. No. 565), who deny that intervention is ever justifiable, is a political doctrine

without any legal basis whatever.

² Many writers constantly commit this confusion.

³ See below, vol. ii. § 9.

ference as consists in help and assistance lent by one State to another at the latter's request for the purpose of suppressing an internal revolution. Thus, for example, in 1826, at the request of the Portuguese Government, Great Britain sent troops to Portugal in order to assist the Government against a threatening revolution on the part of the followers of Don Miguel; and, in 1849, at the request of Austria, Russia sent troops into Hungary to assist Austria in suppressing the Hungarian revolt.

§ 135. It is apparent that such interventions as take place by right must be distinguished from others. Where-
Interven-
tion by
Right.
ever there is no right of intervention, although it may be admissible and excused, an intervention violates either the external independence or the territorial or the personal supremacy. But if an intervention takes place by right, it never constitutes such a violation, because the right of intervention is always based on a legal restriction upon the independence or territorial or personal supremacy of the State concerned, and because the latter is in duty bound to submit to the intervention. Now a State may have a right of intervention against another State, mainly for six reasons: ¹

(1) A suzerain State has a right to intervene in many affairs of the vassal, and a State which holds a protectorate has a right to intervene in all the external affairs of the protected State.

(2) If an external affair of a State is at the same time by right an affair of another State, the latter has a right to intervene in case the former deals with that affair unilaterally.

The events of 1878 provide an illustrative example. Russia had concluded the preliminary Peace of San Stefano with defeated Turkey; Great Britain protested because the conditions of this peace were inconsistent with the Treaty of Paris of 1856 and the Convention of

¹ The enumeration is not intended to be exhaustive.

London of 1871, and Russia agreed to the meeting of the Congress of Berlin for the purpose of arranging matters. Had Russia persisted in carrying out the preliminary peace, Great Britain, as well as other signatory Powers of the Treaty of Paris and the Convention of London, doubtless possessed a right of intervention.

Another example is provided by the Bryan-Chamorro Treaty between the United States and Nicaragua of August 5, 1914, granting to the former an exclusive option to construct another interoceanic canal across Nicaraguan territory, and a naval base in the Gulf of Fonseca, and ceding to the former Great Corn Island and Little Corn Island in the Caribbean Sea. The Republics of Costa Rica, San Salvador, and Honduras protested against this treaty on the ground that it violated treaty rights previously acquired by them. Costa Rica and San Salvador brought an action against Nicaragua before the Central American Court of Justice for the purpose of vindicating their rights, and the Court, on September 30, 1916, and March 9, 1917, pronounced judgment in favour of Nicaragua.¹

(3) If a State which is restricted by an international treaty in its external independence or its territorial or personal supremacy does not comply with the restrictions concerned, the other party or parties have a right to intervene. Thus the United States of America, in 1906, exercised intervention in Cuba in conformity with Article 3 of the Treaty of Havana² of 1903, which stipulates: (‘ The Government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the main-

¹ See *A.J.*, x. (1916), pp. 344-351, and xi. (1917), pp. 156-164, 181-229, 674-730, and below, § 522 n.

² See Martens, *N.R.G.*, 2nd Ser. xxxii. p. 79. Even if no special right of intervention is stipulated, it nevertheless exists in such cases. Thus — see below, § 574 —

those Powers which guaranteed the integrity of Norway under the condition that she did not cede any part of her territory to any foreign Power acquired a right to intervene in case such a cession were contemplated, although the treaty concerned did not stipulate this.

tenance of a Government adequate for the protection of life, property, and individual liberty. . . .’ Likewise the United States of America, in 1904, exercised intervention in Panama in conformity with Article 7 of the Treaty of Washington¹ of 1903, which stipulates: ‘The same right and authority are granted to the United States for the maintenance of public order in the cities of Panama and Colon, and the territories and harbours adjacent thereto in case the Republic of Panama should not be, in the judgment of the United States, able to maintain such order.’ And Great Britain, France, and Russia, the guarantors of the independence of Greece, exercised intervention in Greece during the World War in 1916 and 1917 for the purpose of re-establishing constitutional government in conformity with Article 3 of the Treaty of London of 1863,² which stipulates: ‘Greece, under the sovereignty of Prince William of Denmark and the guarantee of the three Courts, forms a monarchical, independent, and constitutional State.’ King Constantine had to abdicate, and his second son, Alexander, was instituted as King of the Hellenes.³

(4) If a State in time of peace or war violates such rules of the Law of Nations as are universally recognised by custom or are laid down in law-making treaties, other States have a right to intervene, and to make the delin-

¹ See Martens, *N.R.G.*, 2nd Ser. xxxi. (1905), p. 599.

² See Martens, *N.R.G.*, xvii. part ii. p. 79; and Ion in *A.J.*, xii. (1918), pp. 562-588.

³ The author had prepared the following paragraph for insertion in this edition; but against it he had written a note that the question required further consideration. It must not therefore be regarded as being necessarily his fixed and final opinion. ‘In case he is a belligerent, the guarantor of the independence of another State has a right of intervention for the purpose of prevent-

ing such State from taking sides with his enemy, although he has no right to demand that such State should become his ally. Thus in 1916 during the World War, Great Britain, France, and Russia justified several acts of coercion against Greece by referring to the fact that, as they were guarantors of the independence of Greece, the position of Greece during the war could not be compared with the position of other neutral States. However, it is difficult to fix the extent of the right of intervention which a guarantor no doubt possesses.’

quent submit to the rules concerned. If, for instance, a State undertook to extend its jurisdiction over the merchantmen of another State on the high seas, not only would this be an affair between the two States concerned, but all other States would have a right to intervene because the freedom of the open sea is a universally recognised principle. Or if a State which is a party to the Hague Regulations concerning Land Warfare were to violate one of these regulations, all the other signatory Powers would have a right to intervene.

(5) A State that has guaranteed by treaty the form of government of a State, or the reign of a certain dynasty over the same, has a right¹ to intervene in case of change of form of government or of dynasty, provided the treaty of guaranty was concluded between the respective States and not between their monarchs personally.

(6) The right of protection² over citizens abroad, which a State holds, may cause an intervention by right to which the other party is legally bound to submit. And it matters not whether protection of the life, security, honour, or property of a citizen abroad is concerned.

The so-called *Drago*³ *Doctrine*, which asserts the rule that intervention is not allowed for the purpose of making a State pay its public debts, is unfounded, and

¹ But this is not generally recognised; see, for instance, Hall, § 93, who denies the existence of such a right. I do not see the reason why a State should not be able to undertake the obligation to retain a certain form of government or dynasty. That historical events can justify such State in considering itself no longer bound by such treaty according to the principle *rebus sic stantibus* (see below, § 539) is another matter.

² See below, § 319.

³ The Drago Doctrine originates from Louis M. Drago, sometime Foreign Secretary of the Republic of Argentina. See Drago, *Cobro*

coercitivo de Deudas publicas (1906); Barclay, *Problems of International Practice*, etc. (1907), pp. 115-122; Moulin, *La Doctrine de Drago* (1908); Vivot, *La Doctrina Drago* (1911); Borohard, §§ 119-126, 371-378, and pp. 861-864; Higgins, *The Hague Peace Conferences*, etc. (1909), pp. 184-197; Scott, *The Hague Peace Conferences* (1909), vol. i. pp. 415-422; Calvo in *R.I.*, 2nd Ser. v. (1903), pp. 597-623; Drago in *R.G.*, xiv. (1907), pp. 251-287; Moulin in *R.G.*, xiv. (1907), pp. 417-472; Hershey in *A.J.*, i. (1907), pp. 26-45; Drago in *A.J.*, i. (1907), pp. 692-726; Spielhagen in *Z.I.*, xxv. (1915), pp. 509-565.

has not received general recognition, although Argentina and some other South American States tried to establish this rule at the second Hague Peace Conference of 1907. But this conference adopted, on the initiative of the United States of America, a 'Convention¹ respecting the Limitation of the Employment of Force for the Recovery of Contract Debts.' According to Article 1 of this convention, the contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals. This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, renders the settlement of the *compromis* impossible, or, after the arbitration, fails to submit to the award. It must be emphasised that the stipulations of this convention concern the recovery of all contract debts, whether or not they arise from public loans.

§ 136. In contradistinction to intervention by right, there are other interventions which must be considered admissible, although they violate the independence or the territorial or personal supremacy of the State concerned, and although such State has by no means any legal duty to submit patiently and suffer the intervention. Of such interventions in default of right there are two kinds generally admitted and excused—namely, such as are necessary in self-preservation and such as are necessary in the interest of the balance of power.

Admissibility of Intervention in default of Right.

(1) As regards interventions for the purpose of self-preservation, it is obvious that, if any necessary violation—committed in self-defence—of the International Personality of other States is, as shown above (§ 130), excused, such violation must also be excused as is in-

¹ See Scott in *A.J.*, ii. (1908), pp. 78-94.

volved in an intervention. And it matters not whether such an intervention exercised in self-preservation is provoked by an actual or imminent intervention on the part of a third State, or by some other incident. -

(2) As regards intervention in the interest of the balance of power, it is likewise obvious that it must be excused. An equilibrium between the members of the Family of Nations is an indispensable¹ condition of the very existence of International Law. If the States could not keep one another in check, all Law of Nations would soon disappear, as, naturally, an over-powerful State would tend to act according to discretion instead of according to law. Since the Westphalian Peace of 1648 the principle of the balance of power has played a preponderant part in the history of Europe. It found express recognition in 1713 in the Treaty of Peace of Utrecht, it was the guiding star at the Vienna Congress in 1815, when the map of Europe was rearranged, at the Congress of Paris in 1856, the Conference of London in 1867, the Congress of Berlin in 1878, and at the end of the Balkan War in 1913. The States themselves and the majority of writers agree upon the admissibility of intervention in the interest of the balance of power. Most of the interventions exercised in the Balkan Peninsula must, in so far as they are not based on treaty rights, be classified as interventions in the interest of the balance of power. Examples of this are supplied by collective inter-

¹ A survey of the opinions concerning the value of the principle of the balance of power is given by Bulmerincq, *Praxis, Theorie und Codification des Völkerrechts* (1874), pp. 40-50, and Hoijer, *La Théorie de l'Équilibre et le Droit des Gens* (1917), pp. 132-161; but Bulmerincq and Hoijer themselves reject the principle. See also Donnadieu, *Essai sur la Théorie de l'Équilibre* (1900), where the matter is exhaustively treated; Kaerber, *Die Idee des europäischen Gleichgewichts* (1907);

Dupuis, *Le Principe d'Équilibre et le Concert européen* (1909), pp. 90-108, and 494-513; and Ter Meulen, *Der Gedanke der Internationalen Organisation* (1917), pp. 38-60. It is necessary to emphasise that the principle of the balance of power is not a legal principle, and therefore not one of International Law, but one of international policy; it is a political principle indispensable to the existence of International Law in its present condition. See above, § 51 n.

ventions exercised by the Powers in 1886 for the purpose of preventing the outbreak of war between Greece and Turkey, in 1897 during the war between Greece and Turkey with regard to the island of Crete, and in 1913, towards the end of the Balkan War, for the purpose of establishing an independent State of Albania.

§ 137. Many jurists maintain that intervention is likewise admissible, or even has a basis of right, when exercised in the interest of humanity for the purpose of stopping religious persecution and endless cruelties in time of peace and war. That the Powers have in the past exercised intervention on these grounds, there is no doubt. Thus Great Britain, France, and Russia intervened in 1827 in the struggle between revolutionary Greece and Turkey, because public opinion was horrified at the cruelties committed during this struggle. And many a time interventions have taken place to stop the persecution of Christians¹ in Turkey. But whether there is really a rule of the Law of Nations which admits such interventions may well be doubted. Yet, on the other hand, it cannot be denied that public opinion and the attitude of the Powers are in favour of such interventions, and it may perhaps be said that in time the Law of Nations will recognise the rule that interventions in the interest of humanity are admissible, provided they are exercised in the form of a *collective* intervention of the Powers.²

§ 138. Careful analysis of the rules of the Law of Nations regarding intervention and the hitherto exercised practice of intervention makes it apparent that intervention is *de facto* a matter of policy just like war.

¹ Concerning the persecution of the Jews in Christian and other countries, see Wolf, *Notes on the Diplomatic History of the Jewish Question* (1919).

² See Hall, §§ 91 and 95, where the merits of the problem are dis-

cussed from all sides. See also below, § 292; Rougier in *R.G.*, xvii. (1910), pp. 468-526; and Straus in the *Proceedings of the American Society of International Law*, vi. (1912), pp. 45-54.

Interven-
tion in the
Interest
of Hu-
manity.

Interven-
tion *de*
facto a
Matter of
Policy.

This is the result of the combination of several factors. Since, even in the cases in which it is based on a right, intervention is not compulsory, but is solely in the discretion of the State concerned, it is for that reason alone a matter of policy. Since, secondly, every State must decide for itself whether vital interests of its own are at stake and whether a case of necessity in the interest of self-preservation has arisen, intervention is in this respect again a matter of policy. Since, thirdly, the question of the balance of power is so complicated, and the historical development of the States involves gradually an alteration of the division of power between the States, it must likewise be left to the appreciation of every State whether or not it considers the balance of power endangered and, therefore, an intervention necessary. And who can undertake to lay down a hard and fast rule with regard to the amount of inhumanity on the part of a Government that would justify intervention according to the Law of Nations ?

No State will ever intervene in the affairs of another if it has not some important interest in doing so, and it has always been easy for such State to find or pretend some legal justification for an intervention, be it self-preservation, balance of power, or humanity. There is no great danger to the welfare of the States in the fact that intervention is *de facto* a matter of policy. Too many interests are common to all the members of the Family of Nations, and too great is the natural jealousy between the Great Powers, for an abuse of intervention on the part of one powerful State to pass unchallenged by other States. Since unjustified intervention violates the very principles of the Law of Nations, and since, as I have stated above (§ 135), in case of a violation of these principles on the part of a State every other State has a right to intervene, any unjustifiable intervention by one State in the affairs of another gives

a right of intervention to all other States. Thus it becomes apparent here, as elsewhere, that the Law of Nations is intimately connected with the interests of all the States, and that they must themselves secure the maintenance and realisation of this law. This condition of things tends naturally to hamper more the ambitions of weaker States than those of the several Great Powers, but it seems unalterable.

§ 139. The *de facto* political character of the whole matter of intervention becomes clearly apparent through the so-called Monroe Doctrine¹ of the United States of America. This doctrine, at its first appearance, was indirectly a product of the policy of intervention in the interest of legitimacy which the Holy Alliance pursued in the beginning of the nineteenth century after the downfall of Napoleon. The Powers of this Alliance were inclined to extend their policy of intervention to America, and to assist Spain in regaining her hold over the former Spanish colonies in South America, which had declared and maintained their independence, and which were recognised as independent sovereign States by the United States of America. To meet and to check the imminent danger, President James Monroe delivered his celebrated Message to Congress on December 2, 1823. This Message contains two quite different, but nevertheless equally important, declarations.

The
Monroe
Doctrine.

¹ Wharton, § 57; Dana's Note, No. 36, to Wheaton, pp. 97-112; Tucker, *The Monroe Doctrine* (1885); Moore, *The Monroe Doctrine* (1895), and *Digest*, vi. §§ 927-968; Cespedès, *La Doctrine de Monroe* (1893); Mérignhac, *La Doctrine de Monroe à la Fin du XIX^e Siècle* (1896); Beaumarchais, *La Doctrine de Monroe* (1898); Reddaway, *The Monroe Doctrine* (1898); Pétin, *Les États-Unis et la Doctrine de Monroe* (1900); Anderson in the *Proceedings of the American Society of International Law*, vi. (1912), pp. 72-82; Lehr in *R.I.*, 2nd Ser. xv. (1913),

pp. 50-60, and xvi. (1914), pp. 51-59; Hoeberlin in *Z.V.*, vii. (1913), pp. 11-38; Kraus, *Die Monroedoktrin* (1913); Bartlett in the *Law Magazine and Review*, xxxix. (1914), pp. 385-427; Zeballos in *R.G.*, xxi. (1914), pp. 297-339; Root and Chandler in *A.J.*, viii. (1914), pp. 427-442, and 515-519; Hull, *The Monroe Doctrine* (1915); *Proceedings of the American Society of International Law*, viii. (1914), pp. 6-230; Armstrong in *A.J.*, x. (1916), pp. 77-103; Hart (A. B.), *The Monroe Doctrine* (1915), (most useful on account of its bibliography).

(1) In connection with the unsettled boundary lines in the north-west of the American continent, the Message declared 'that the American continents, by the free and independent condition which they have assumed and maintained, are henceforth not to be considered as subjects for future colonisation by any European Power.' This declaration was never recognised by the European Powers, and Great Britain and Russia protested expressly against it. In fact, however, no occupation of American territory has since then taken place on the part of a European State.

(2) In regard to the contemplated intervention of the Holy Alliance between Spain and the South American States, the Message declared that the United States had not intervened, and never would intervene, in wars in Europe, but could not, on the other hand, in the interest of her own peace and happiness, allow the allied European Powers to extend their political system to any part of America, and try to intervene in the independence of the South American republics.

Since the time of President Monroe, the Monroe Doctrine has been gradually somewhat extended in so far as the United States claims a kind of political hegemony over all the States of the American continent. Whenever a conflict occurs between such an American State and a European Power, the United States is ready to exercise intervention.¹ Through the civil war her hands were to a certain extent bound in the sixties of the last century, and she could not prevent the occupation of Mexico by the French army, but she intervened in 1865. Again, she did not intervene in 1902 when Great Britain, Germany, and Italy took combined action

¹ All the cases of intervention on the part of the United States in the interest of the Monroe Doctrine are

discussed in the thorough work of Kraus, *Die Monroedoktrin* (1913), pp. 82-267.

against Venezuela, because she was cognisant of the fact that this action was intended merely to make Venezuela comply with her international duties. But she intervened in 1896 in the boundary conflict between Great Britain and Venezuela ¹ when Lord Salisbury had sent an *ultimatum* to Venezuela, and she retains the Monroe Doctrine as a matter of principle.

Not so much an extension as an extensive interpretation of the Monroe Doctrine has taken place through the Senate adopting the following resolution on August 2, 1912: ² 'When any harbour or other place in the American continents is so situated that the occupation thereof for naval or military purposes might threaten the communications or safety of the United States, the Government of the United States could not see, without grave concern, the possession of such harbour or other place by any corporation or association which had such a relation to another Government, not American, as to give that Government practical power of control for naval or military purposes.'

§ 140. The importance of the Monroe Doctrine is of a political, not of a legal character. Since the Law of Nations is a law between all the civilised States as equal members of the Family of Nations, the States of the American continent are subjects of the same international rights and duties as the European States. The European States are, as far as the Law of Nations is concerned, absolutely free to acquire territory in America as elsewhere. And the same legal rules are valid concerning intervention on the part of European

Merits
of the
Monroe
Doctrine.

¹ See Cleveland, *The Venezuelan Boundary Question* (1913).

² This resolution was passed on account of the so-called *Magdalena Bay* case. The Magdalena Bay Company, an American company which owned a tract of land of over 400,000 acres, including the Magdalena Bay

in Mexico, intended to sell this land to a Japanese company, but before carrying out its intention, communicated with the Department of State in Washington for the purpose of ascertaining whether there was any objection to the intended transaction. See Kraus, *op. cit.*, pp. 230-238.

Powers both in American ¹ affairs and in affairs of other States. But it is evident that the Monroe Doctrine, as the guiding star of the policy of the United States, is of the greatest *political* importance. And it ought not to be maintained that this policy is in any way inconsistent² with the Law of Nations. In the interest of the balance of power in the world, the United States considers it a necessity that European Powers should not acquire more territory on the American continent than they actually possess. She considers, further, her own welfare so intimately connected with that of the other American States, that she thinks it necessary, in the interest of self-preservation, to watch closely the relations of these States with Europe and also the relations between these States themselves, and, if need be, to intervene in conflicts. Since every State must decide for itself whether and where vital interests of its own are at stake, and whether the balance of power is endangered to its disadvantage, and since, as explained above (§ 138), intervention is therefore *de facto* a matter of policy, there is no legal impediment to the United States carrying out a policy in conformity with the Monroe Doctrine. This policy was a necessity in order to establish and maintain the independence of the South American States, which, while the Monroe Doctrine remains in force, are somewhat hampered by it. But with their growing strength it will gradually disappear. For, whenever some of these States become Great Powers themselves, they will no longer submit to the political hegemony of the United States, and the Monroe Doctrine will have played its part.³

¹ Many American writers, however, assert that the Monroe Doctrine could be established as a rule of 'American' International Law. See, for instance, Alvarez in *R.G.*, xx. (1913), p. 50, and Anderson in the *Proceedings of the American Society of International Law*, vi. (1912), p. 51.

² It is very much to be regretted that Kraus, whose excellent mono-

graph ought to be read by every student of International Law, maintains that the Monroe Doctrine is inconsistent with International Law.

³ The author was of opinion that Article 21 of the Covenant of the League of Nations (see below, § 167) does *not* make the doctrine a rule of International Law.

VII

INTERCOURSE

Grotius, ii. c. 2, §§ 13-17—Vattel, ii. §§ 21-26—Hall, § 13—Taylor, § 160—Hershey, No. 148—Bluntschli, § 381 and p. 26—Hartmann, § 15—Heffter, §§ 26 and 33—Holtzendorff in *Holtzendorff*, ii. pp. 60-64—Gareis, § 27—Liszt, § 7—Ullmann, § 38—Bonfils, Nos. 285-289—Despagnet, No. 183—Mérignhac, i. pp. 256-258—Pradier-Fodéré, iv. Nos. 1899-1904—Rivier, i. pp. 262-264—Nys, ii. pp. 263-274—Calvo, iii. §§ 1303-1305—Fiore, i. No. 370—Martens, i. § 79.

§ 141. Many adherents of the doctrine of fundamental rights include therein also a right of intercourse for every State with all others. This right of intercourse is said to comprise a right of diplomatic, commercial, postal, telegraphic intercourse, of intercourse by railway, a right for foreigners to travel and reside on the territory of every State, and the like. But if the real facts of international life are taken into consideration, it becomes at once apparent that such a fundamental right of intercourse does not exist. All the consequences which are said to follow from the right of intercourse are not at all consequences of a right, but nothing else than consequences of the fact that intercourse between the States is a condition without which a Law of Nations would not and could not exist. The civilised States make a community of States because they are knit together through their common interests, and the manifold intercourse which serves these interests. Through intercourse with one another, and with the growth of their common interests, the Law of Nations has grown up among the civilised States. Where there is no intercourse, there cannot be a community and a law for such community. A State cannot be a member of the Family of Nations and an International Person, if it has no intercourse whatever with

Inter-
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ality.

at least one or more other States. Varied intercourse with other States is a necessity for every civilised State. The mere fact that a State is a member of the Family of Nations shows that it has various intercourse with other States, for otherwise it would never have become a member of that family. Intercourse is therefore one of the characteristics of the position of the States within the Family of Nations, and it may be maintained that intercourse is a presupposition of the International Personality of every State. But no special right or rights of intercourse between the States exist according to the Law of Nations. It is because such special rights of intercourse do not exist that the States conclude special treaties regarding matters of post, telegraphs, telephones, railways, and commerce. On the other hand, most States keep up protective duties to exclude or hamper foreign trade in the interest of their home commerce, industry, and agriculture. And although as a rule they allow¹ aliens to travel and to reside on their territory, they can expel every foreign subject according to discretion.

Consequences of Intercourse as a Presupposition of International Personality.

§ 142. Intercourse being a presupposition of International Personality, the Law of Nations favours intercourse in every way. The whole institution of legation serves the interest of intercourse between the States, as does the consular institution. The right of legation,² which every full sovereign State undoubtedly holds, is held in the interest of intercourse, as is certainly the right of protection over citizens abroad³ which every State possesses. The freedom of the open sea,⁴ which has been universally recognised since the end of the first quarter of the nineteenth century, the right of

¹ That an alien has no right to demand to be admitted to British territory was decided in the case of *Musgrove v. Chun Teeong Toy*, [1891] A.C. 272.

² See below, § 360.

³ See below, § 319. The right of protection over citizens abroad is frequently said to be a special right of self-preservation, but it is really a right in the interest of intercourse.

⁴ See below, § 259.

every State to the passage of its merchantmen through the maritime belt¹ of all other States, and, further, freedom of navigation for the merchantmen of all nations on so-called international rivers,² are further examples of provisions of the Law of Nations in the interest of international intercourse.

The question whether a State has the right to require such States as are outside the Family of Nations to open their ports and allow commercial intercourse is frequently discussed and answered in the affirmative. Since the Law of Nations is a law between those States only which are members of the Family of Nations, it has certainly nothing to do with this question, which is therefore one of mere commercial policy and of morality.

VIII

JURISDICTION

Hall, §§ 62, 75-80—Westlake, i. pp. 246-281—Lawrence, §§ 93-109—Phillimore, i. §§ 317-355—Twiss, i. §§ 157-171—Halleck, i. pp. 198-270—Taylor, §§ 169-171—Wheaton, §§ 77-151—Moore, ii. §§ 175-249—Hershey, No. 149—Bluntschli, §§ 388-393—Heffter, §§ 34-39—Bonfils, Nos. 263-266—Rivier, i. § 28—Nys, ii. pp. 304-310—Fiore, i. Nos. 475-558—Praag, Nos. 25-48.

§ 143. Jurisdiction is for several reasons a matter of importance as regards the position of the States within the Family of Nations. States possessing independence and territorial as well as personal supremacy can naturally extend or restrict their jurisdiction as far as they like. However, as members of the Family of Nations and International Persons, the States must exercise self-restraint in the interest of one another in using this natural power. Since intercourse of all kinds takes place between the States and their subjects,

Jurisdiction important for the Position of the States within the Family of Nations.

¹ See below, § 188.

² See below, § 178.

the matter ought to be thoroughly regulated by the Law of Nations. But such regulation has as yet only partially grown up. The consequence of both the regulation and non-regulation of jurisdiction is that concurrent jurisdiction of several States can often at the same time be exercised over the same persons and matters. And it can also happen that matters fall under no jurisdiction because the several States which could extend their jurisdiction over these matters refuse to do so, each leaving them to the other's jurisdiction.

Restric-
tions upon
Terri-
torial
Jurisdic-
tion.

§ 144. As all persons and things within the territory of a State fall under its territorial supremacy, every State has jurisdiction over them. The Law of Nations, however, gives a right to every State to claim so-called extritoriality, and therefore exemption from local jurisdiction, chiefly for its head,¹ its diplomatic envoys,² its men-of-war,³ and its armed forces⁴ abroad. And partly by custom and partly by treaty obligations, Eastern non-Christian States, Japan now excepted, are restricted⁵ in their territorial jurisdiction with regard to foreign resident subjects of Christian Powers.

Jurisdic-
tion over
Citizens
abroad.

§ 145. The Law of Nations does not prevent a State from exercising jurisdiction over its subjects travelling or residing abroad, since they remain under its personal supremacy. As every State can also exercise jurisdiction over aliens⁶ within its boundaries, such aliens are often under two concurrent jurisdictions. And, since a State is not obliged to exercise jurisdiction for all matters over aliens on its territory, and since the home State is not obliged to exercise jurisdiction

¹ Details below, §§ 348-353, and 356. The exemption of a State itself from the jurisdiction of another is not based upon a claim to extritoriality, but upon the claim to equality; see above, § 115.

² Details below, §§ 385-405.

³ Details below, §§ 450-451. As

regards the very limited extritoriality of merchantmen which are by distress compelled to enter a foreign port, see below, § 189.

⁴ Details below, § 445.

⁵ Details below, §§ 318 and 440.

⁶ See below, § 317.

over its subjects abroad, it may and does happen that aliens are actually for some matters under no State's jurisdiction.

§ 146. As the open sea is not under the sway of any State, no State can exercise its jurisdiction there. Jurisdiction on the Open Sea. But it is a rule of the Law of Nations that vessels, and the things and persons thereon, remain during the time they are on the open sea under the jurisdiction of the State under whose flag they sail.¹ It is another rule of the Law of Nations that piracy² on the open sea can be punished by any State, whether or not the pirate sails under the flag of a State. Further,³ a general practice seems to admit the claim of every maritime State to exercise jurisdiction over cases of collision at sea, whether the vessels concerned are or are not sailing under its flag. Again, in the interest of the safety of the open sea, every State has the right to order its men-of-war to ask any suspicious merchantman they meet on the open sea to show the flag, to arrest foreign merchantmen sailing under its flag without an authorisation for its use, and to pursue into the open sea, and to arrest there, such foreign merchantmen as have committed a violation of its law whilst in its ports or maritime belt.⁴ Lastly, in time of war belligerent States have the right to order their men-of-war to visit, search, and eventually capture on the open sea all neutral vessels for carrying contraband, breach of blockade, or unneutral services to the enemy.

§ 147. Many States claim jurisdiction and threaten punishment for certain acts committed by a foreigner in foreign countries.⁵ States which claim jurisdiction of this kind threaten punishment for certain acts either against the State itself, such as high treason, forging Criminal Jurisdiction over Foreigners in Foreign States.

¹ See below, § 260.

² See below, § 278.

³ See below, § 265.

⁴ See below, § 266.

⁵ See Hall, § 62; Westlake, i. pp. 261-263; Lawrence, § 104; Taylor, § 191; Moore, ii. §§ 200 and 201; Phillimore, i. § 334.

bank-notes, and the like, or against its citizens, such as murder or arson, libel and slander, and the like. These States cannot, of course, exercise this jurisdiction as long as the foreigner concerned remains outside their territory. But if, after the committal of such act, he enters their territory and comes thereby under their territorial supremacy, they have an opportunity of inflicting punishment. The question is, therefore, whether States have a right to jurisdiction over acts of foreigners committed in foreign countries, and whether the home State of such an alien has a duty to acquiesce in the latter's punishment in case he comes into the power of these States. The question, which is controversial, ought to be answered in the negative.¹ For at the time such criminal acts are committed the perpetrators are neither under the territorial nor under the personal supremacy of the States concerned. And a State can only require respect for its laws from such aliens as are permanently or transiently within its territory. No right for a State to extend its jurisdiction over acts of foreigners committed in foreign countries can be said to have grown up according to the Law of Nations, and the right of protection over citizens abroad held by every State would justify it in an intervention in case one of its citizens abroad should be required to stand his trial before the courts of another State for criminal acts which he did not commit during the time he was under the territorial supremacy of such State.²

¹ But Continental publicists answer the question in the affirmative. See Mortitz, *Internationale Rechtshilfe in Strafsachen* (1888), p. 82, and Praag, No. 45.

² The Institute of International Law has studied the question at several meetings, and in 1883, at its meeting at Munich (see *Annuaire*, vii. p. 156), among a body of fifteen articles concerning the conflict of the Criminal Laws of different States,

adopted the following (Article 8):—
‘Every State has a right to punish acts committed by foreigners outside its territory and violating its penal laws when those acts contain an attack upon its social existence, or endanger its security, and when they are not provided against by the Criminal Law of the territory where they take place.’ But it must be emphasised that this resolution has value *de lege ferenda* only.

In the only case¹ which is reported—namely, in the case of Cutting—an intervention took place according to this view. In 1886 one A. K. Cutting, a subject of the United States, was arrested in Mexico for an alleged libel against one Emigdio Medina, a subject of Mexico, which was published in the newspaper of El Paso in Texas. Mexico maintained that she had a right to punish Cutting, because according to her Criminal Law offences committed by foreigners abroad against Mexican subjects are punishable in Mexico. The United States, however, intervened,² and demanded Cutting's release. Mexico refused to comply with this demand, but nevertheless Cutting was finally released, as the plaintiff withdrew his action for libel. Since Mexico likewise refused to comply with the demand of the United States to alter her Criminal Law for the purpose of avoiding in the future a similar incident, diplomatic practice has not at all settled the subject.

¹ The case of *Cirilo Pouble*—see Moore, ii. § 200, pp. 227-228—concerning which the United States at first was inclined to intervene, proved to be a case of a crime committed within Spanish jurisdiction. The case of *John Anderson*—see Moore, i. § 174, pp. 932-933—is likewise not relevant, as he claimed to be a British subject.

² See Westlake, i. p. 252; Taylor,

§ 192; Calvo, vi. §§ 171-173; Moore, ii. § 201; and *Report on Extra-territorial Crime and the Cutting Case* (1887); Rolin and Gamboa in *R.I.*, xx. (1888), pp. 559-577, and xxii. (1890), pp. 234-250. The case is fully discussed and the American claim is disputed by Mendelssohn Bartholdy, *Das räumliche Herrschaftsgebiet des Strafgesetzes* (1908), pp. 135-143.

CHAPTER III

RESPONSIBILITY OF STATES

I

ON STATE RESPONSIBILITY IN GENERAL

Grotius, ii. c. 17, § 20, and c. 21, § 2—Pufendorf, viii. c. 6, § 12—Vattel, ii. §§ 63-78—Hall, § 65—Halleck, i. pp. 471-476—Wharton, i. § 21—Moore, vi. §§ 979-1039—Wheaton, § 32—Hershey, Nos. 150-157—Bluntschli, § 380a—Heffter, §§ 101-104—Holtzendorff in *Holtzendorff*, ii. pp. 70-74—Liszt, § 24—Ullmann, § 39—Bonfils, Nos. 324-332—Despagnet, No. 466—Piedelièvre, i. pp. 317-322—Pradier-Fodéré, i. Nos. 196-210—Rivier, ii. pp. 40-44—Calvo, iii. §§ 1261-1298—Fiore, i. Nos. 659-679, and *Code*, Nos. 596-615—Martens, i. § 118—Clunet, *Offenses et Actes hostiles commis par des Particuliers contre un État étranger* (1887)—Triepel, *Völkerrecht und Landesrecht* (1899), pp. 324-381—Anzilotti, *Teoria generale della Responsabilità dello Stato nel Diritto internazionale* (1902)—Wiese, *Le Droit international appliqué aux Guerres civiles* (1898), pp. 43-65—Rougier, *Les Guerres civiles et le Droit des Gens* (1903), pp. 448-474—Baty, *International Law* (1908), pp. 91-242—Borchard, §§ 73-130—Costa, *El Extranjero en la Guerra civil* (1913)—Marinoni, *La Responsabilità degli Stati per gli Atti dei loro Rappresentanti* (1914)—Schoen, *Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen* (1917)—Anzilotti in *R.G.*, xiii. (1906), pp. 5-29, and 285-309—Foster in *A.J.*, i. (1907), pp. 4-10—Bar in *R.I.*, 2nd Ser. i. (1899), pp. 464-481—Arias in *A.J.*, vii. (1913), pp. 724-765—Goebel in *A.J.*, viii. (1914), pp. 802-852—Peaslee in *A.J.*, x. (1916), pp. 328-336—Harriman in the *Proceedings of the American Society of International Law*, ix. (1916), pp. 69-77.

Nature
of State
Responsi-
bility.

§ 148. It is often maintained that a State, as a sovereign person, can have no legal responsibility whatever. This is only correct with reference to certain acts of a State towards its subjects. Since a State can abolish parts of its Municipal Law and can make new Municipal Law, it can always avoid legal, although not moral,

responsibility by a change of Municipal Law. Different from this internal autocracy is the external responsibility of a State to fulfil its international legal duties. Responsibility for such duties is, as will be remembered,¹ a quality of every State as an International Person, without which the Family of Nations could not peaceably exist. Although there is at present no International Court of Justice which could summon a State and establish its responsibility for neglect of its international duties, State responsibility concerning international duties is nevertheless a *legal* responsibility. For a State cannot abolish or create new International Law in the same way that it can abolish or create new Municipal Law. A State, therefore, cannot renounce its international duties unilaterally² at discretion, but is and remains legally bound by them. And although there is not and never will be a central authority above the several States to enforce the fulfilment of these duties, there is the legalised self-help of the several States against one another. For every neglect of an international legal duty constitutes an international delinquency,³ and the violated State can through reprisals or even war compel the delinquent State to comply with its international duties. It is only theorists who deny the possibility of a legal responsibility of States; the practice of the States themselves recognises it distinctly, although there may in a special case be controversy as to whether a responsibility is to be borne. And State responsibility is now in a general way recognised for the time of war by Article 3 of the Hague Convention of 1907, concerning the Laws and Customs of War on Land, which stipulates: 'A belligerent party

¹ See above, § 113.

² See Annex to Protocol I. of the Conference of London, 1871, where the Signatory Powers proclaim that 'it is an essential principle of the Law of Nations that no Power can

liberate itself from the engagements of a treaty, or modify the stipulations thereof, unless with the consent of the contracting Powers by means of an amicable arrangement.'

³ See below, § 151.

which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.'

Original
and
Vicarious
State
Responsi-
bility.

§ 149. Now if we examine the various international duties out of which responsibility of a State may rise, we find that it is necessary to distinguish two different kinds of State responsibility. They may be named 'original' in contradistinction to 'vicarious' responsibility. I name as 'original' the responsibility borne by a State for its own—that is, for its Government's actions, and such actions of the lower agents or private individuals as are performed at the Government's command or with its authorisation. But States have to bear another responsibility besides that just mentioned. For States are, according to the Law of Nations, in a sense responsible for certain acts other than their own—namely, certain unauthorised injurious acts of their agents, of their subjects, and even of such aliens as are for the time living within their territory. This responsibility of States for acts other than their own I name 'vicarious' responsibility. Since the Law of Nations is a law between States only, and since States are the sole exclusive subjects of International Law, individuals are mere objects ¹ of International Law, and the latter is unable to confer directly rights and duties upon individuals. And for this reason the Law of Nations must make every State in a sense responsible for certain internationally injurious acts committed by its officials, subjects, and such aliens as are temporarily resident on its territory.²

¹ See below, § 290.

² The distinction between original and vicarious responsibility was first made, in 1905, in the first edition of this treatise, and ought therefore to have been discussed by Anzilotti in his able article in *R. G.*, xiii. (1906), p. 292. The fact that he does not

appreciate this distinction is prejudicial to the results of his researches concerning the responsibility of States. This distinction is approved of by Borchard, § 74, but rejected by Schoen, *op. cit.*, pp. 40-42, who defends Anzilotti.

§ 150. It is, however, obvious that original and vicarious State responsibility are essentially different. Whereas the one is responsibility of a State for a neglect of its own duty, the other is not. A neglect of international legal duties by a State constitutes an international delinquency. The responsibility which a State bears for such a delinquency is especially grave, and requires, apart from other special consequences, a formal expiatory act, such as an apology at least, by the delinquent State to repair the wrong done. On the other hand, the vicarious responsibility which a State bears requires chiefly compulsion to make those officials or other individuals who have committed internationally injurious acts repair as far as possible the wrong done, and punishment, if necessary, of the wrongdoers. In case a State complies with these requirements, no blame falls upon it on account of such injurious acts. But of course, in case a State refuses to comply with these requirements, it commits thereby an international delinquency, and its hitherto vicarious responsibility turns *ipso facto* into original responsibility.

Essential
Difference
between
Original
and
Vicarious
Responsi-
bility.

II

STATE RESPONSIBILITY FOR INTERNATIONAL DELINQUENCIES

See the literature quoted above at the commencement of § 148, and especially Borchard, § 82, and Schoen, *op. cit.*, pp. 21-63.

§ 151. International delinquency is every injury to another State committed by the head and the Government of a State through violation of an international legal duty. Equivalent to acts of the head and Government are acts of officials or other individuals commanded or authorised by the head or Government.

Concep-
tion of
Inter-
national
Delin-
quencies.

An international delinquency is not a crime, because the delinquent State, as a sovereign, cannot¹ be punished in the same way as a delinquent individual, although compulsion may be exercised to procure a reparation of the wrong done.

International delinquencies in the technical sense of the term must not be confounded either with so-called 'Crimes against the Law of Nations,' or with so-called 'International Crimes.' 'Crimes against the Law of Nations,' in the wording of many Criminal Codes of the several States, are such acts of individuals against foreign States as are rendered criminal by these codes. Of these acts, the gravest are those for which the State on whose territory they are committed bears a vicarious responsibility according to the Law of Nations. 'International Crimes,' on the other hand, refer to crimes like piracy on the high seas or slave trade, which either every State can punish on seizure of the criminals, of whatever nationality they may be, or which every State has by the Law of Nations a duty to prevent.

An international delinquency must, further, not be confounded with discourteous and unfriendly acts. Although such acts may be met by retorsion, they are not illegal and therefore not delinquent acts.

Subjects
of Inter-
national
Delin-
quencies.

§ 152. An international delinquency may be committed by every member of the Family of Nations, be such member a full sovereign, half sovereign, or part sovereign State. Yet half and part sovereign States can commit international delinquencies in so far only as they have a footing within the Family of Nations, and therefore international duties of their own. And even then the circumstances of each case decide whether the delinquent has to account for its neglect of an inter-

¹ For this reason the Hague Court of Arbitration by its award in the case of *The Carthage*—see below,

vol. ii. § 403a—refused to pronounce a fine of one franc against Italy, as demanded by France.

national duty directly to the wronged State, or whether it is the full sovereign State (suzerain, federal,¹ or protectorate-exercising State), to which the delinquent State is attached, that must bear a vicarious responsibility for the delinquency. On the other hand, such States as are without any footing whatever within the Family of Nations, as, for example, the member-States of the American Federal States, because all their possible international relations are absorbed by the respective Federal States, cannot commit an international delinquency. Thus an injurious act against France committed by the Government of the State of California in the United States of America, would not be an international delinquency in the technical sense of the term, but merely an internationally injurious act for which the United States of America must bear a vicarious responsibility. An instance of this is to be found in the conflict² which arose in 1906 between Japan and the United States of America, on account of the segregation of Japanese children by the Board of Education of San Francisco, and the demand of Japan that this measure should be withdrawn. The Government of the United States at once took the side of Japan, and endeavoured to induce California to comply with the Japanese demands.

§ 153. Since States are juristic persons, the question arises,—Whose internationally injurious acts are to be considered State acts and therefore international delinquencies? It is obvious that acts of this kind are, first, all such acts as are performed by the heads of States or by the members of a Government acting in

State
Organs
able to
commit
Inter-
national
Delin-
quencies.

¹ See Donot, *De la Responsabilité de l'État fédéral à Raison des Actes des États particuliers* (1912), where a number of important cases are discussed. See also Gammans in *A.J.*, viii. (1914), pp. 73-80; Cohen in *Z.V.*, viii. (1914), pp. 134-153;

Borchard, § 82; Schoen, *op. cit.*, pp. 100-107.

² See Hyde in *The Green Bag*, xix. (1907), pp. 38-49; Root in *A.J.*, i. (1907), pp. 273-286; Barthélemy in *R.G.*, xiv. (1907), pp. 636-685.

that capacity, so that their acts appear as State acts. Acts of such kind are, secondly, all acts of officials or other individuals which are either commanded or authorised by Governments. On the other hand, unauthorised acts of corporations, such as municipalities, or of officials, such as magistrates or even ambassadors, or of private individuals, never constitute an international delinquency. And, further, all acts committed by heads of States and members of a Government outside their official capacity, simply as individuals who act for themselves and not for the State, are not international delinquencies.¹ The States concerned must certainly bear a vicarious responsibility for all such acts, but for that very reason these acts do not comprise international delinquencies.

No International Delinquency without Malice or Culpable Negligence.

§ 154. An act of a State injurious to another State is nevertheless not an international delinquency if committed neither wilfully and maliciously nor with culpable negligence.² Therefore, an act of a State committed by right, or prompted by self-preservation in necessary self-defence, does not constitute an international delinquency, however injurious it may actually be to another State.³ And the same is valid in regard to acts of officials or other individuals committed by command or with the authorisation of a Government.

§ 155. International delinquencies may be committed against so many different objects that it is im-

¹ See below, §§ 158-159.

² Schoen, *op. cit.*, p. 62, defends the opinion that in certain cases a State can be made responsible although there is no culpable negligence on its part. He is compelled to adopt this opinion because—following Anzilotti—he rejects the fundamental distinction between original and vicarious responsibility, and considers a State originally, and not only vicariously, responsible for

all internationally injurious acts of its officials.

³ Although violations of another State prompted by self-preservation in necessary self-defence are not international delinquencies because there is no *mens rea*, they nevertheless—see above, § 129—remain violations. They can therefore be repulsed, and indemnities may be demanded for damage done. But Schoen (*op. cit.*, pp. 115-118) denies this.

possible to enumerate them. It suffices to give some striking examples. Thus a State may be injured—in regard to its independence through an unjustified intervention; in regard to its territorial supremacy through a violation of its frontier; in regard to its dignity through disrespectful treatment of its head or its diplomatic envoys; in regard to its personal supremacy through forcible naturalisation of its citizens abroad; in regard to its treaty rights through an act violating a treaty; in regard to its right of protection over citizens abroad through any act that violates the person, the honour, or the property¹ of one of its citizens abroad. A State may also suffer various injuries in time of war by illegitimate acts of warfare, or by a violation of neutrality on the part of a neutral State in favour of the other belligerent. And a neutral may in time of war be injured in various ways through a belligerent violating neutrality by acts of warfare within the neutral State's territory, (for instance, through a belligerent man-of-war attacking an enemy vessel in a neutral port or in neutral territorial waters); or through a belligerent violating neutrality by acts of warfare committed on the open sea against neutral vessels.

§ 156. The nature of the Law of Nations as a law between, not above, sovereign States excludes the possibility of punishing a State for an international delinquency and of considering the latter in the light of a crime, though it may be thought to be an atrocious crime, if morally considered. The only legal consequences of an international delinquency that are possible under existing circumstances are such as create reparation of the moral and material wrong done.² The merits

Objects
of Inter-
national
Delin-
quencies.

Legal Con-
sequences
of Inter-
national
Delin-
quencies.

¹ That a State which does not pay its public debts due to foreigners, and refuses, on the demand of the home State of the foreigners concerned, to make satisfactory arrangements, commits an international delinquency

there is no doubt. On the so-called Drago Doctrine, and the Hague Convention concerning the Employment of Force for the Recovery of Contract Debts, see above, § 135 (6).

² See Schoen, *op. cit.*, pp. 122-143.

and the conditions of the special cases are, however, so different, that it is impossible for the Law of Nations to prescribe once for all what legal consequences an international delinquency should have. The only rule which is unanimously recognised by theory and practice is that out of an international delinquency arises a right for the wronged State to request from the delinquent State the performance of such expiatory acts as are necessary for a reparation of the wrong done. What kind of acts these are depends upon the special case and the discretion of the wronged State. It is obvious that there must be a pecuniary reparation for a material damage. Thus, according to Article 3 of the Hague Convention of 1907, concerning the Laws and Customs of War on Land, a belligerent party which violates these laws shall, if the case demands, be liable to make compensation. But at least a formal apology on the part of the delinquent will in every case be necessary. This apology may have to take the form of some ceremonial act, such as a salute to the flag or to the coat of arms of the wronged State, the despatch of a special embassy bearing apologies, and the like. A great difference would naturally be made between acts of reparation for international delinquencies deliberately and maliciously committed, and for such as arise merely from culpable negligence.

When the delinquent State refuses reparation for the wrong done, the wronged State can exercise such means as are necessary to enforce an adequate reparation. In case of international delinquencies committed in time of peace, such means are reprisals¹ (including embargo and pacific blockade) and war, as the case may require. On the other hand, in case of international delinquencies committed in time of war through illegitimate acts of warfare on the part of a belligerent, such means are reprisals and the taking of hostages.²

¹ See below, vol. ii. § 34.

² See below, vol. ii. §§ 248 and 259.

III

STATE RESPONSIBILITY FOR ACTS OF STATE ORGANS

See the literature quoted above at the commencement of § 148, and especially Moore, vi. §§ 998-1018, Borchard, §§ 75-81, and 127-130, Schoen, *op. cit.*, pp. 80-122, and Marinoni, *La Responsabilità degli Stati per gli Atti dei loro Rappresentanti* (1914).

§ 157. States must bear vicarious responsibility for all internationally injurious acts of their organs. As, however, these organs are of different kinds and of different position, the actual responsibility of a State for acts of its organs varies with the agents concerned. It is therefore necessary to distinguish between internationally injurious acts of heads of States, members of a Government, diplomatic envoys, parliaments, judicial functionaries, administrative officials, and military and naval forces.

§ 158. Such internationally injurious acts as are committed by heads of States in the exercise of their official functions are not our concern here, because they constitute international delinquencies, which have been discussed above (§§ 151-156). But a monarch can, just as any other individual, in his private life commit many internationally injurious acts; and the question is, whether and in what degree a State must bear responsibility for such acts of its head. The position of a head of a State, who is, within and without his State, neither under the jurisdiction of a court of justice nor under any kind of disciplinary control, makes it a necessity for the Law of Nations to impose a certain vicarious responsibility upon States for internationally injurious acts committed by their heads in private life. Thus, for instance, when a monarch during his stay abroad commits an act injurious to the property of a foreign

Responsi-
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varies
with
Organs
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Inter-
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Injurious
Acts of
Heads of
States.

subject and refuses adequate reparation, his State may be requested to pay damages on his behalf.

Inter-
nationally
Injurious
Acts of
Members
of Govern-
ment.

§ 159. As regards internationally injurious acts of members of a Government, a distinction must be made between such acts as are committed by the offenders in their official capacity, and other acts. Acts of the first kind constitute international delinquencies, as stated above (§ 153). But members of a Government can in their private life perform as many internationally injurious acts as private individuals, and we must ascertain therefore what kind of responsibility their State must bear for such acts. Now, as members of a Government have not the exceptional position of heads of States, and are, therefore, under the jurisdiction of the ordinary courts of justice, there is no reason why their State should bear for internationally injurious acts committed by them in their private life a vicarious responsibility different from that which it has to bear for acts of private persons.

Inter-
nationally
Injurious
Acts of
Diplo-
matic
Envoys.

§ 160. The position of diplomatic envoys who, as representatives of their home State, enjoy the privileges of extraterritoriality, gives, on the one hand, a very great importance to internationally injurious acts committed by them on the territory of the receiving State, and, on the other hand, excludes the jurisdiction of the receiving State over such acts. The Law of Nations therefore makes the home State in a sense responsible for all acts of an envoy injurious to the State or its subjects in whose territory he resides. But it depends upon the merits of the special case what measures beyond simple recall must be taken to satisfy the wronged State. Thus, for instance, a crime committed by the envoy on the territory of the receiving State must be punished by his home State, and according to special circumstances and conditions the home State may be obliged to disown an act of its envoy, to apolo-

gise or express its regret for his behaviour, or to pay damages. It must, however, be remembered that such injurious acts as an envoy performs at the command or with the authorisation of his home State, constitute international delinquencies for which the home State bears original responsibility, and for which the envoy cannot personally be blamed.

§ 161. As regards internationally injurious attitudes of parliaments, it must be kept in mind that, most important as may be the part parliaments play in the political life of a nation, they do not belong to the agents which represent the States in their international relations with other States. Therefore, however injurious to a foreign State an attitude of a parliament may be, it can never constitute an international delinquency. That, on the other hand, all States must bear vicarious responsibility for such attitudes of their parliaments, there can be no doubt. But, although the position of a Government is difficult in such cases, especially in States that have a representative Government, this does not concern the wronged State, which has a right to demand satisfaction and reparation for the wrong done.¹

§ 162. Internationally injurious acts committed by judicial functionaries in their private life are in no way different from such acts committed by other individuals. But these functionaries may in their official capacity commit such acts, and the question is how far the vicarious responsibility of a State for acts of its judicial functionaries can reasonably be extended in face of the fact that in modern civilised States these functionaries are almost entirely independent of their Government.² Undoubtedly, in case of such denial³ or undue delay of

Inter-
nationally
Injurious
Attitudes
of Parlia-
ments.

Inter-
nationally
Injurious
Acts of
Judicial
Function-
aries.

¹ See details in Borchard, § 75.

abundant and instructive material on this question.

² Wharton, ii. § 230, comprises

³ See Borchard, §§ 127-130.

justice by the courts as is internationally injurious, a State must find means to exercise compulsion against such courts. And the same is valid with regard to an obvious and malicious act of misapplication of the law by the courts which is injurious to another State. But if a court observes its own proper forms of justice and nevertheless makes a materially unjust order or pronounces a materially unjust judgment, matters become so complicated that there is hardly a peaceable way in which the injured State can successfully obtain reparation for the wrong done, unless the other party consents to bring the case before a Court of Arbitration.

An illustrative case is that of *The Costa Rica Packet*,¹ which happened in 1891. Carpenter, the master of this Australian whaling-ship, was, by order of a court of justice, arrested on November 2, 1891, in the port of Ternate, in the Dutch East Indies, for having committed three years previously a theft on the sea within Dutch territorial waters. He was, however, released on November 28, because the court found that the alleged crime was not committed within Dutch territorial waters, but on the high seas. Great Britain demanded damages for the arrest of the master of the *Costa Rica Packet*, but Holland maintained that, since the judicial authorities concerned had ordered the arrest of Carpenter in strict conformity with the Dutch laws, the British claim was unjustified. After some correspondence, extending over several years, Great Britain and Holland agreed, in 1895, upon having the conflict settled by arbitration and upon appointing the late Professor de Martens of St. Petersburg as arbitrator. The award, given in 1897, was in favour of Great Britain, and Holland was condemned to pay

¹ See Bles in *R.I.*, xxviii. (1896), pp. 452-468; Regelsperger in *R.G.*, iv. (1897), pp. 735-745; Valery in *R.G.*, v. (1898), pp. 57-66; Moore,

i. § 148. See also Ullmann, *De la Responsabilité de l'État en Matière judiciaire* (1911); Borchard, § 81.

damages to the master, the proprietors, and the crew of the *Costa Rica Packet*.¹

§ 163. Internationally injurious acts committed in the exercise of their official functions by administrative officials and military and naval forces of a State without that State's command or authorisation, are not international delinquencies, because they are not State acts. But a State bears a wide, unlimited, and unrestricted² vicarious responsibility for such acts because its administrative officials and military and naval forces are under its disciplinary control, and because all acts of such officials and forces in the exercise of their official functions are *prima facie* acts of the State.³ Therefore, a State has, first of all, to disown and disapprove of such acts by expressing its regret or even apologising to the Government of the injured State; secondly, damages must be paid⁴ where required; and, lastly, the offenders must be punished according to the merits of the special case.

Inter-
nationally
Injurious
Acts of
Adminis-
trative
Officials
and Mili-
tary and
Naval
Forces.

As regards the question what kind of acts of administrative officials and military and naval forces are of an internationally injurious character, the rule may safely be laid down that such acts are internationally injurious as would constitute international delinquencies when committed by the State itself, or with its authorisation. Four very instructive cases may be quoted as illustrative examples:

(1) On September 26, 1887, a German soldier on sentry duty at the frontier near Vexaincourt shot from the German side and killed an individual who was on

¹ The whole correspondence on the subject and the award are printed in Martens, *N.R.G.*, 2nd Ser. xxiii. (1898), pp. 48, 715, and 808.

² Borchard (§ 77) objects to this statement.

³ It is of importance to quote again here Article 3 of the Hague Convention of 1907, concerning the Laws

and Customs of War on Land, which stipulates that a State is responsible for all acts committed by its armed forces.

⁴ Grotius, ii. c. 17, § 20, denies this: 'Neque vero si quid milites, aut terrestres, aut nautici, contra imperium amicis nocuissent, reges teneri. . . .'

French territory. As this act of the sentry violated French territorial supremacy, Germany disowned and apologised for it, and paid a sum of fifty thousand francs to the widow of the deceased as damages. The sentry, however, escaped punishment because he proved that he had acted in obedience to orders which he had misunderstood.

(2) On November 26, 1905, Hasmann, a member of the crew of the German gunboat *Panther*,¹ at that time in the port of Itajahy in Brazil, failed to return on board his ship. The commander of the *Panther* sent a search party, comprising three officers in plain clothes and a dozen non-commissioned officers and soldiers in uniform, on shore for the purpose of finding the whereabouts of Hasmann. This party, during the following night, penetrated into several houses, and compelled some of the residents to assist them in their search for the missing Hasmann, who, however, could not be found. He voluntarily returned on board the following morning. As this act violated Brazilian territorial supremacy, Brazil lodged a complaint with Germany, which, after an inquiry, disowned the act of the commander of the *Panther*, formally apologised for it, and punished the commander of the *Panther* by relieving him of his command.²

(3) On July 15, 1911, while the Spanish were in occupation of Alcazar in Morocco, M. Boisset, the French consular agent, who was riding back to Alcazar from Suk el Arba with his native servants, was stopped at the gate of the town by a Spanish sentinel. The sentinel refused to allow him to enter unless he and his servants first delivered up their arms. As M. Boisset refused, the sentinel barred the way with his fixed

¹ See *R.G.*, xiii. (1906), pp. 200-206.

² Another example occurred in 1904, when the Russian Baltic fleet,

on its way to the Far East during the Russo-Japanese War, fired upon the Hull fishing fleet off the Dogger Bank. See below, vol. ii. § 5.

bayonet and called out the guard. M. Boisset's horse reared, and the sentinel thereupon covered him with his rifle. After parleying to no purpose with the guard, to whom he explained who he was, the French consular agent was conducted by an armed escort of Spanish soldiers to the Spanish barracks. A native rabble followed upon the heels of the procession and cried out : ' The French consular agent is being arrested by the Spaniards.' Upon arriving at the barracks M. Boisset had an interview with a Spanish officer, who, without in any way expressing regret, merely observed that there had been a misunderstanding (*equivocacione*), and allowed the French consular agent to go his way. It is obvious that, as consuls in Eastern non-Christian countries, Japan now excepted, are exterritorial and inviolable, the arrest of M. Boisset was a great injury to France, which lodged a complaint with Spain. As promptly as July 19 the Spanish Government tendered a formal apology to France, and instructed the Spanish commander at Alcazar to tender a formal apology to M. Boisset.

(4) In December 1915, during the World War, and at a time when the United States was still neutral, an Austrian submarine fired upon an American merchantman, flying the American flag, in the Mediterranean. The United States Government demanded an apology for this ' deliberate insult to the flag of the United States,' the punishment of the submarine commander, and reparation for damage done.¹

But it must be specially emphasised that a State never bears any responsibility for losses sustained by foreign subjects through *legitimate* acts of administrative officials and military and naval forces. Individuals who enter foreign territory submit themselves to the law of the land, and their home State has no right to

¹ A.J., x. (1916), Special Supplement, p. 306.

request that they should be otherwise treated than as the law of the land authorises a State to treat its own subjects.¹ Therefore, since the Law of Nations does not prevent a State from expelling aliens, the home State of an expelled alien cannot request the expelling State to pay damages for the losses sustained by him through having to leave the country. Therefore, further, a State need not make any reparation for losses sustained by an alien through legitimate measures taken by administrative officials and military forces in time of war, insurrection,² riot, or public calamity, such as a fire, an epidemic outbreak of dangerous disease, and the like.

IV

STATE RESPONSIBILITY FOR ACTS OF PRIVATE PERSONS

See the literature quoted above at the commencement of § 148, and especially Moore, vi. §§ 1019-1031, Borchard, §§ 86-96, and Schoen, *op. cit.* pp. 63-80. See also Arias in *A.J.*, vii. (1913), pp. 724-765, and Goebel in *A.J.*, viii. (1914), pp. 802-852.

Vicarious
in contra-
distinc-
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Original
State
Responsi-
bility for
Acts of
Private
Persons.

§ 164. As regards State responsibility for acts of private persons, it is first of all necessary not to confound the original with the vicarious responsibility of States for internationally injurious acts of private persons. International Law imposes the duty upon every State to prevent as far as possible its own subjects, and such foreign subjects as live within its territory, from committing injurious acts against other States. A State which either intentionally and maliciously or through culpable negligence does not comply with this duty commits an international delinquency for which it has to bear original responsibility. But it is in

¹ Provided, however, such law does not violate essential principles of justice. See below, § 320.

² See below, § 167.

practice impossible for a State to prevent all injurious acts which a private person might commit against a foreign State. It is for that reason that a State must, according to International Law, bear vicarious responsibility for such injurious acts of private individuals as are incapable of prevention.¹

§ 165. Now, whereas the vicarious responsibility of States for official acts of administrative officials and military and naval forces is unlimited and unrestricted, their vicarious responsibility for acts of private persons is only relative. For their sole duty is to exercise due diligence to prevent internationally injurious acts on the part of private persons, and, in case such acts have nevertheless been committed, to procure satisfaction and reparation for the wronged State, as far as possible, by punishing the offenders and compelling them to pay damages where required. Beyond this limit a State is not responsible for acts of private persons; there is in particular no duty for a State itself to pay damages for such acts if the offenders are not able to do it. If, however, a State has not exercised due diligence, it can be made responsible and held to pay damages.¹

Vicarious
Responsi-
bility for
Acts of
Private
Persons
relative
only.

§ 166. It is a consequence of the vicarious responsibility of States for acts of private persons that by the Criminal Law of every civilised State punishment is severe for certain offences of private persons against foreign States, such as violation of ambassadors' privileges, libel on heads of foreign States and on foreign envoys, and other injurious acts.² In every case that arises the offender must be prosecuted and the law enforced by the courts of justice. And it is further a consequence of the vicarious responsibility of States for acts of private persons that criminal offences of

Municipal
Law for
Offences
against
Foreign
States.

¹ See Borchard, § 87.

² As regards the Criminal Law of

England concerning such acts, see Stephen's *Digest*, Articles 96-103.

private persons against foreign subjects—such offences are indirectly offences against the respective foreign States because the latter exercise protection over their subjects abroad—must be punished according to the ordinary law of the land, and that the civil courts of justice of the land must be accessible for claims of foreign subjects against individuals living under the territorial supremacy of such land.

Responsi-
bility for
Acts of In-
surgents
and
Rioters.

§ 167. The vicarious responsibility of States for acts of insurgents and rioters¹ is the same as for acts of other private individuals. Therefore only in case a State by exercising due diligence could have prevented, or immediately crushed, an insurrection or riot, can it be made responsible for acts of insurgents and rioters. In other cases the duty of a State concerned is only to punish according to the law of the land, as soon as peace and order are re-established, such insurgents and rioters as have committed criminal injuries against foreign States. The point need not be mentioned at all were it not for the fact that, in several cases of insurrection and riots, claims have been made by foreign States against the local State for damages for losses sustained by their subjects through acts of insurgents or rioters, and that some writers² assert that such claims are justified by the Law of Nations. The majority of writers maintain, correctly, I think, that the responsibility of States does not involve the duty to repair the losses which foreign subjects have sustained through acts of insurgents and rioters, provided due diligence was exercised by the State concerned.

Individuals who enter foreign territory must take the risk of an outbreak of insurrections or riots no less than the

¹ See Goebel in *A.J.*, viii. (1914), pp. 802-852, who supplies valuable material, but differs from the opinion of the author. See also the details given by Borchard, §§ 89-96.

² See for instance, Rivier, ii. p. 43; Brusa in *Annuaire*, xvii. pp. 96-137; Bar in *R.I.*, 2nd Ser. i. (1899), pp. 464-481; Goebel, *op. cit.*

risk of the outbreak of other calamities. When they sustain a loss from acts of insurgents or rioters, they may, if they can, trace their losses to the acts of certain individuals, and claim damages from the latter before the courts of justice. The responsibility of a State for acts of private persons injurious to foreign subjects reaches only so far that its courts must be accessible to the latter for the purpose of claiming damages from the offenders, and must punish such of those acts as are criminal. And in States—as, for instance, France—which have such Municipal Laws as make the town or the county where an insurrection or riot has taken place responsible for the pecuniary loss sustained by individuals during those events, foreign subjects must be allowed to claim damages from the local authorities for losses of such a kind. But the State itself never has by International Law a duty to pay such damages.

The practice of the States agrees ¹ with this rule laid down by a majority of writers. Although in a number of cases several States have paid damages for losses of this kind, they have done it, not through compulsion of law, but for political reasons. In most cases in which the damages have been claimed for such losses, the States concerned have refused to comply with the request.² As such claims have, during the second half of the nineteenth century, frequently been tendered against American States which have repeatedly been the scene of insurrections, several of these States in commercial and similar treaties which they concluded with other States expressly stipulated ³ that

¹ Goebel (*op. cit.*, pp. 819-831) asserts that the practice of the States has undergone a change, but I cannot see that he has proved his assertion.

² See the cases in Calvo, iii. §§ 1283-1290.

³ See, for instance, Martens,

N.R.G., 2nd Ser. ix. p. 474 (Germany and Mexico); xv. p. 840 (France and Mexico); xix. p. 831 (Germany and Colombia); xxii. p. 308 (Italy and Colombia). A full list of such treaties is given by Arias in *A.J.*, vii. (1913), pp. 755, 756, 759, 760, and Borchard, p. 244 n.

they are not responsible¹ for losses sustained by foreign subjects on their territory through acts of insurgents and rioters.

The Institute of International Law has studied the matter, and has proposed² the following *Règlement* concerning it :

(1) Independently of the case in which indemnities are due to foreigners by virtue of the general laws of the country, foreigners have a right to compensation when they are injured as to their person or as to their property in the course of a riot, of an insurrection, or of a civil war :

(a) When the act from which they have suffered is directed against foreigners as such in general, or against them as under the jurisdiction of a certain State, or

(b) When the act from which they have suffered consists in closing a port without due and proper previous notification, or in retaining foreign ships in a port, or

(c) When the injury is the result of an act contrary to the laws committed by a government official, or

(d) When the obligation to compensate is established by virtue of the general principles of the law of war.

(2) The obligation is equally well established when the injury has been committed (No. 1, *a* and *d*) on the territory of an insurrectionary Government, whether by this Government itself, or by one of its functionaries.

On the other hand, certain demands for indemnity may be set aside when they concern facts which occur after the Government of the State to which the injured person belongs has recognised the insurrectionary Government as a belligerent Power, and when the injured person has continued to keep his domicile or his habitation on the territory of the insurrectionary Government.

As long as the latter is considered by the Government of the person alleged to be injured as a belligerent Power, the demand may only be addressed, in the case of paragraph 1 of Article 2, to the insurrectionary Government and not to the legitimate Government.

¹ The question of responsibility for losses of foreign citizens during a revolution is treated with excellent judgment by Hyde in his paper on 'Mexico and the Claims of

Foreigners,' in the *Illinois Law Review* (January, 1914), vol. viii. No. 6.

² At its meeting at Neuchâtel in 1900; see *Annuaire*, xviii. p. 254.

(3) The obligation to compensate ~~disappears~~ when the injured persons are themselves a cause of the event which has brought the injury.¹ Notably no obligation exists to indemnify those who have returned to the country or who wish to give themselves up to commerce or industry there, when they know, or ought to know, that troubles have broken out, nor to indemnify those who establish themselves or sojourn in a country which offers no security on account of the presence of savage tribes, unless the Government of the country has given express assurance to immigrants.

(4) The Government of a Federal State composed of a certain number of smaller States, which it represents from an international point of view, may not plead, in order to avoid the responsibility which falls upon it, the fact that the constitution of the Federal State does not give it the right to control the member-States, nor the right to exact from them the discharge of their obligations.

(5) The stipulations mutually exempting States from the duty of giving their diplomatic protection ought not to comprise the cases of refusal of justice, or of evident violation of justice or of International Law.²

¹ For example, in the case of conduct which is particularly provocative to a crowd.

² The Institute of International Law has likewise — see *Annuaire*, xviii. pp. 253 and 256—expressed the two following *vœux* :—

(a) The Institute of International Law expresses the wish that the States should avoid inserting in treaties clauses of reciprocal irresponsibility. It considers that these clauses are wrong in exempting States from the fulfilment of their duty of protecting their nationals abroad and of their duty of protecting foreigners on their territory.

It considers that the States which, on account of extraordinary circumstances, do not feel themselves at all in a position to assure protection in a sufficiently efficacious manner to foreigners on their territory, can only avoid the consequences of this condition of things by temporarily prohibiting foreigners from entering their territory.

(b) Recourse to international commissions of inquiry and to international tribunals is in general recommended for all differences which may arise on account of injury to foreigners in the course of a riot, an insurrection, or of civil war.

CHAPTER IV

THE LEAGUE OF NATIONS EMBODYING THE FAMILY OF NATIONS

I

BIRTH AND GENERAL CHARACTER OF THE LEAGUE

How the
League
arose.

§ 167*a*. The League of Nations owes its existence, in the first instance, to private initiative. Soon after the World War had broken out, a group of men in England, under the chairmanship of Viscount Bryce, combined for the purpose of working out a draft scheme of a League for the avoidance of war, and they published, in February 1915, *Proposals for the Avoidance of War*, with a prefatory note by Viscount Bryce. The text of these proposals was sent to a number of publicists for criticism, and in 1917 the same group of men published the final result of their work in a pamphlet under the heading, *Proposals for the Prevention of Future Wars*, by Viscount Bryce and others. The movement initiated by the so-called Bryce Committee led to the foundation of 'The League of Nations Society' in London, in 1915, whose programme was in the main: That a treaty should be made to establish a League of Nations; that all disputes between the members of the League should be settled either by arbitration or by a Council of Conciliation; that Conferences of the League should be held from time to time to consider international matters and to codify rules of International Law. In 1918 a

rival of the League of Nations Society was founded—‘The League of Free Nations Association’; but soon afterwards the two rival societies amalgamated, under the title of ‘The League of Nations Union.’

A similar movement arose in the United States of America, where in 1916 was founded ‘The League to enforce Peace,’ under the chairmanship of ex-President H. Taft, which demanded the foundation of a League whose programme should be in the main: That all justiciable disputes between the members of the League should be settled by an International Court of Justice; that all other disputes should be submitted to a Council of Conciliation; that economic and military forces should be used against any member that should resort to hostilities without previously having submitted the dispute either to an International Court of Justice or to a Council of Conciliation; and that Conferences of the members of the League should take place from time to time to formulate and codify rules of International Law.

A great number of drafts of a Constitution of the proposed League were published by private individuals, and several Governments also began to give their attention to the movement. Thus the Governments of Sweden, Denmark, and Norway each appointed a committee whose combined labours resulted in the *Avant-projet de Convention relatif à une Organisation juridique internationale*, Stockholm, 1919. And the Swiss Government likewise appointed a committee, and published, in 1919, an *Avant-projet d'un Pacte fédéral de la Ligue des Nations*. Meanwhile the Government of the United States, under President Wilson, as well as the British Government, became interested in the movement, and pledged themselves to found a League of Nations as soon as the war should come to an end. Accordingly, when the Peace Conference met in Paris in 1919, a separate committee was appointed to work out a draft

treaty of a League of Nations. This committee comprised the representatives of fourteen Powers, namely, the British Empire, America, France, Italy, Japan—the five Great Powers—and Belgium, Brazil, China, Czechoslovakia, Greece, Poland, Portugal, Roumania, and Serbia. This committee laid a draft of a Covenant of the League of Nations before the Conference, which was adopted on February 14, 1919. The draft was published, and then representatives of the following thirteen neutral Powers were interrogated by the committee for the purpose of hearing their views, namely: Argentina, Chili, Colombia, Denmark, Holland, Norway, Paraguay, Persia, Salvador, Spain, Sweden, Switzerland and Venezuela. At the same time a number of publicists were asked to send in observations on the draft, which was then amended. A second draft was worked out, and was adopted by the Conference on April 28, 1919. Thus came into existence the Covenant of the League of Nations, which forms Part I of the Treaties of Peace.¹

The Membership
of the
League.

§ 167*b*. According to Article 1 of the Covenant, the League is to consist of original members, and of such members as are admitted later.

Original members of the League are the Allied and Associated Powers—signatories of the Treaties of Peace,—and such neutral States as were invited to become, and became members within two months of the coming into force² of the Covenant. Accordingly the following States and self-governing Dominions became original members: [The United States of America,]³ Belgium, Bolivia, Brazil, the British Empire, Canada, Australia, South Africa,

¹ See below, §§ 568*e*-568*g*. Both French and English texts are authoritative. The English text of the Covenant has been separately published as a Parliamentary Paper (Misc., No. 3 (1919), Cmd. 151), and should be in the hands of every

student.

² January 10, 1920.

³ The United States is named in the treaties as an original member of the League; but as it has not so far ratified any of them, it is not at present a member.

New Zealand, India, China,¹ Cuba, Ecuador, France, Greece, Guatemala, Haiti, the Hedjaz, Honduras, Italy, Japan, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Roumania, the Serb-Croat-Slovene State, Siam, Czecho-Slovakia, Uruguay—signatories of the Treaties of Peace; and the Argentine Republic, Chili, Colombia, Denmark, the Netherlands, Norway, Paraguay, Persia, Salvador, Spain, Sweden, Switzerland, Venezuela—neutral States which accepted the invitation to become members.

As regards States which desire to join the League later, paragraph 2 of Article 1 lays down the rule that any fully self-governing State, dominion, or colony may become a member of the League, if its admission is agreed to by two-thirds of the Assembly of the League, provided that it shall give effective guarantees of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval, and air forces and armaments. It is apparent that thereby the door is left open for every civilised State to become in time a member of the League.

However this may be, any member of the League may, according to paragraph 3 of Article 1, cease to be a member, provided it gives two years' notice in advance, and has, at the time of its withdrawal, fulfilled all its international obligations, and all its obligations under the Covenant of the League. Further, according to paragraph 4 of Article 16, any member of the League which has violated any clause of the Covenant may be expelled from the League. Again, according to Article 26, no future amendment of the Covenant shall bind any member of the League which signifies its dissent, but in that case it shall cease to be a member of the League.

¹ China signed the Treaty of Peace with Austria, but not the Treaty of Peace with Germany.

Essential
Character
of the
League.

§ 167c. Since the Covenant of the League distinguishes between original members and others, and since a small number of civilised States are not yet members of the League, the character of the League appears at the first glance to be somewhat doubtful.

It is asserted that the League is a mere confederation of States (*Staatenbund*), but it is certainly not. One speaks of a confederation of States (*Staatenbund*) when a number of full sovereign States link themselves together into a union for the maintenance of their external and internal independence, such union possessing organs of its own which are vested with a certain amount of power over the member-States.¹ However, the Covenant of the League of Nations in no way gives the three constitutional organs of the League any power whatever over the member-States of the League. The chief organ of the League, the Assembly, requires, apart from matters of mere procedure, unanimity for all its decisions; and the Council, although it is, so to say, the Executive of the League, and possesses very great influence, does not possess any compulsory powers over the member-States, since its decisions are in the main only recommendations.

It is likewise asserted that the League is a mere alliance. However, although the League shows traces of an alliance, because the members (Article 10 of the Covenant) guarantee to one another their territorial integrity against external aggression, it is nothing of the kind. One speaks of an alliance² when two or more States conclude a treaty for offence or defence or both. Although alliances create a union between the allies, such a union does not possess any organs of its own, nor is there anything else but defence or offence within the sphere of action of an alliance. On the other hand, the League of Nations possesses a number

¹ See above, § 88.

² See below, § 569.

of organs of its own, and its sphere of action comprises a great many more matters than mutual defence of the members.

If looked upon without prejudice, the League appears to be a league absolutely *sui generis*, a union of a kind which has never before been in existence ; and its constitutional organs, as well as its functions, are likewise of an unprecedented kind. Taking all this into consideration, the conclusion is obvious that the League of Nations is intended to take the place of what hitherto used to be called the Family of Nations, namely, the community of civilised States, for the international conduct of which International Law has grown up. The Covenant of the League is an attempt to organise the hitherto unorganised community of States by a written constitution. That this constitution is not complete and perfect matters as little as that for the moment there are still some civilised States outside the League, because this constitution will gradually become more complete and perfect, and the time may not be very distant when all civilised States, without exception, will be members.

Be that as it may, through this constitution, defining the rights and duties between the League and the member-States, the League¹ appears to be a subject of International Law and an International Person side by side with the several States. And it is necessary to emphasise that the League is in every respect an International Person *sui generis*, something not to be likened to anything else, for it is neither a State nor a Federal State (*Bundesstaat*), nor a confederation of States (*Staatenbund*), nor a mere alliance. As already stated, in its

¹ Only the League itself is a subject of International Law, not the organs of the League such as the Assembly, the Council, and the Secretariat. These organs certainly have rights and duties according to

the Covenant of the League, but these are neither international nor municipal rights and duties, but simply rights and duties within the organisation set up by the Covenant. See below, § 289 n.

essence the League is nothing else than the organised Family of Nations. Not being a State, and neither owning territory nor ruling over citizens, the League does not possess sovereignty in the sense of State sovereignty. However, being an International Person *sui generis*, the League is the subject of many rights which, as a rule, can only be exercised by sovereign States. For instance, the League possesses the so-called right of legation¹; is able to exercise sovereign rights over such territories as are not under the sovereignty of any State (Saar Basin)²; is able to intervene in the internal³ as well as the external affairs of a State; is able to exercise a protectorate over a weak State (Danzig)⁴; is able to declare war and make peace; and the like.

It should be noted that, in case the League came to an end by dissolution, the Family of Nations would revert to its unorganised condition previous to the establishment of the League. But the League ought by its nature to be indissoluble, and it is to be hoped that the question of its dissolution will never arise.

II

THE CONSTITUTION OF THE LEAGUE

The Constitution in general of the League.

§ 167*d*. The constitution of the League, as provided for by the Covenant, is not in all details complete, because several essential matters are left to be settled later. But the Covenant calls into existence three constitutional organs, namely, the Assembly, the Council, and the Permanent Secretariat. It also (Article 7) fixes the seat of the League at Geneva in

¹ See below, §§ 358-362.

² See below, § 568*e*.

³ For example, in the smaller

States to protect minorities. See below, § 568*f*.

⁴ See above, § 93.

Switzerland, although the Council may at any time decide that the seat of the League shall be established elsewhere. Besides the three constitutional organs; the Covenant orders the establishment of a number of other organs of the League, in particular a Permanent Armament Commission, an International Court of Justice, a Mandatory Commission, and such other organs as are necessary to secure fair and humane conditions of labour. And with regard to all organs and positions under, or in connection with, the League, including the Secretariat, Article 7 lays down the rule that they shall be open equally to men and women; that representatives of the members of the League in the Assembly and in the Council, and likewise all officials of the League, when engaged on the business of the League, shall enjoy diplomatic privileges and immunities¹; and that the buildings and other property occupied by the League or its officials or by representatives attending the meetings of the League shall be inviolable.

It must be specially noted that the constitution of the League is in no way immutable, and that alterations can be made without a unanimous vote of all the member-States. According to Article 26, amendments to the Covenant of the League will take effect, if the States represented in the Council and the majority of the States represented in the Assembly of the League agree to them. Indeed, no such amendment will bind any member of the League which signifies its dissent therefrom, but in any case of such dissent the State concerned ceases to be a member. Be that as it may, the mere fact that the Covenant provides for amendments makes it quite clear that the Powers did not intend to produce an unalterable constitution for the League. The fact is that the Covenant offers only the partly filled framework of the constitution of the League, which in

¹ See below, §§ 385-396.

time will assuredly have to undergo alterations and additions.

The As-
sembly.

§ 167*e*. The Assembly is really the Conference of the members of the League. According to Article 3, each member of the League may send three representatives to the Assembly, but no member has more than one vote. The Assembly meets at stated intervals, and from time to time as occasion may require, at the seat of the League, or at such other place as may be decided upon. The first meeting of the Assembly (Article 5) is to be summoned by the President of the United States of America. The Assembly decides (Article 5) all matters of procedure, including the appointment of committees, by a mere majority vote, but all other matters can only be decided by a unanimous vote, unless—see, for instance, Articles 1, 4, 6, and 26—the contrary is expressly provided for by the Covenant, or by some other agreement.

As regards the sphere of action of the Assembly, the Covenant (Article 3) says that the Assembly may deal at its meetings with any matter within the sphere of action ¹ of the League or affecting the peace of the world. However, it is apparent that all such matters are excluded from the sphere of action of the Assembly as are by the Covenant exclusively reserved for the sphere of action of the Council. Be that as it may, the Covenant particularly mentions that in the following matters the Assembly is competent to act :

(1) According to Article 1, the Assembly decides by a vote of two-thirds majority whether a State, not being an original member, is to be admitted into the League.

(2) According to Article 11, it is the right of each member of the League to draw the attention of the Assembly to any such circumstances affecting inter-

¹ The restriction of the sphere of action of the League, stipulated in

paragraph 8 of Article 15, and in Article 21, is discussed below, § 167*f*.

national relations as threaten to disturb international peace, or the good understanding between nations upon which peace depends.

(3) According to paragraph 9 of Article 15, the Council may refer any dispute, which has come to it for the purpose of inquiry, to the Assembly. And such dispute must be referred to the Assembly at the request of either party, provided that such request be made within fourteen days after the submission of the dispute to the Council.

(4) According to Article 19, the Assembly may from time to time advise the reconsideration, by members of the League, of treaties which have become inapplicable, and the consideration of international conditions whose continuance might endanger the peace of the world.¹

(5) According to Article 4, the Assembly from time to time selects the four representatives of the minor States who, together with the representatives of [the United States of America],² the British Empire, France, Italy, and Japan, constitute the Council of the League.

(6) According to Article 6, the Council may only appoint the Secretary-General if the selected individual is approved of by a majority vote of the Assembly.

(7) According to paragraph 2 of Article 4, only with the approval of a majority vote of the Assembly may the Council increase the number of its members, which at first is fixed at nine.

§ 167*f*. The Council is, so to say, the Executive of the League. According to Article 4, the Council consists, at first, and as a rule, of nine members. The five Great Powers—[the United States of America],² the British Empire, France, Italy, and Japan—are always represented in the Council by a member. The minor Powers send four representatives into the Council, but the selection of the four minor Powers who

¹ See below, § 167*e* (4).

² See above, § 167*b*, n.

are to send these representatives is to be made from time to time by the Assembly at its discretion. Until the Assembly shall have first made such a selection, the representatives of Belgium, Brazil, Greece, and Spain are to represent the minor Powers on the Council. However, it is only as a rule that the Council comprises no more than nine members, because in exceptional cases such States as are not represented in the Council have the right to send additional representatives. Paragraph 5 of Article 4 stipulates: 'Any member of the League not represented on the Council shall be invited to send a representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that member of the League.' And although at first the Council will comprise nine members only, the possibility of a permanent increase in the number of its members is provided for by paragraph 2 of Article 4, which stipulates: 'With the approval of the majority of the Assembly, the Council may name additional members of the League whose representatives shall always be members of the Council; the Council with like approval may increase the number of members of the League to be selected by the Assembly for representation on the Council.' It is obvious that this stipulation is meant to meet the cases of Germany and Russia when once they are admitted to the League, and are to be considered as Great Powers; but the case of China, or any other Power which might at any time become a Great Power, is likewise met by this stipulation.

Meetings of the Council (Article 4) shall take place from time to time as occasion may require, but at least once a year, at the seat of the League, or at such other place as may be decided upon. The Council—just like the Assembly—decides (Article 5) all matters of pro-

cedure, including the appointment of committees, by a majority vote, but all other matters can only be decided by a unanimous vote, unless the contrary is expressly provided for, either by the Covenant or by another agreement.

As regards the sphere of action of the Council, the Covenant (Article 4)—just as in the case of the Assembly—says that the Council may deal at its meetings with any matter within the sphere of action¹ of the League or affecting the peace of the world, and it may therefore be stated that all such matters of international interest fall within the sphere of action of the Council as are not by the Covenant exclusively reserved for the sphere of action of the Assembly. However, the Covenant mentions that the following seven matters are particularly to be dealt with by the Council :

(1) Appointment of the Secretary-General of the League and confirmation of the appointments of the staff of the Secretariat made by him (Article 6).

(2) Formulation of plans for general disarmament, and for check of the manufacture, by private enterprise, of munitions and implements of war, and the appointment of the members of the Permanent Armament Commission (Articles 8 and 9).

(3) Advice to the members of the League with regard to the steps they shall take when any one of them is threatened with aggression (Articles 10 and 11).

(4) Inquiry into international disputes which the parties have not settled by other means, report on such disputes, and recommendations with regard to their settlement (Articles 12, 15, and 17).

(5) Formulation of plans for the establishment of a Permanent Court of International Justice (Article 14).

(6) Recommendation as to what effective military,

¹ The restriction of the sphere of action of the League by paragraph 8

of Article 15 and Article 21 of the Covenant is discussed below, § 167*i*.

naval, or air forces the members of the League shall severally contribute to the armed forces to be used to protect the Covenants of the League (Article 16).

(7) Drawing up of the special charters or mandates concerning such territories as are to be handed over for administration to Mandatory States; further, the establishment, at the seat of the League, of a Mandatory Commission to receive and examine the annual reports of the Mandatory Powers, and to advise the Council on all matters relating to the observation of the mandates (Article 22).

As regards the relations between the Council and the Assembly, they are not defined by the Covenant. It would seem that the Council is absolutely independent of the Assembly, just as the Assembly is absolutely independent of the Council. The only influence which the Assembly indirectly has upon the Council derives from the fact that, according to Article 4, the Assembly shall from time to time make the selection of those four minor States which shall have the right to send representatives into the Council side by side with the representatives of the five Great Powers. And the only influence which the Council has upon the Assembly derives from the fact that, according to Article 26, members represented in the Assembly can only make amendments to the Covenant provided that the States represented in the Council unanimously agree. So much is certain, that the relations between the Council and the Assembly are in no way comparable with the relations between the Cabinet and Parliament in a constitutionally governed State, because the Council does not depend on the Assembly as a Cabinet depends upon Parliament. And, if looked upon from a certain point of view, the centre of gravity of the League would seem to rest within the Council, and not within the Assembly, although the latter is the chief organ of the

League. This is the case, because the five Great Powers are predominant within the Council, with the consequence that the influence of the Great Powers within the League will be enormous. There would be no objection to this if the sphere of action of the Council were restricted to mere executive measures, and to measures of control, the appointment of officials, and the like. However, according to the Covenant, as it stands, the sphere of action of the Council is a much wider one, and the important task of the inquiry into, and settlement of, such international disputes as the parties cannot settle by other means, is entirely handed over to the Council.¹

§ 167*g*. The Permanent Secretariat of the League (Article 6) is the body of secretaries and clerks who are permanent officials in the service of the League for the performance of all secretarial business. The Secretariat is to be established at Geneva, the seat of the League. It comprises a Secretary-General, and such number of secretaries and staff as may be required. The Secretary-General, other than the first, is to be appointed by the Council, with the approval of the majority of the Assembly. On the other hand, the secretaries and staff are appointed by the Secretary-General with the approval of the Council. The expenses of the Secretariat are borne by the member-States of the League in accordance with the apportionment of the expenses of the International Bureau of the Universal Postal Union.² As regards the duties of the Secretariat, the Covenant specifies some of them in three articles :

(1) According to Article 6, the Secretary-General shall act in that capacity at all meetings of the Assembly as well as of the Council. However, it is quite obvious that the Secretary-General need not in person act as secretary at all such meetings: he may at any time

¹ See below, § 167*s* (2).

² See below, § 465.

The Per-
manent
Secre-
tariat.

delegate this duty to one or more of the secretaries who serve under him.

(2) According to Article 15, the Secretary-General is the intermediary between the Council and member-States of the League involved in a dispute which has to be submitted to the Council for inquiry.

(3) According to Article 18, the Secretariat must register, and, as soon as possible, publish, every treaty entered into by any member-State of the League.

These are the duties of the Secretariat specified by the Covenant ; but it is obvious that it has many other duties, which derive from the fact that it always acts as the intermediary for communications, not only between the Council and the Assembly, but also between the several members of the Council, between the several member-States of the League with regard to all matters in which the League is concerned, between the Council and the Court of Justice and the several Commissions which are to be set up according to the Covenant, and lastly between the Council and all the International Bureaux which, according to Article 24, are to be placed under the direction of the League. Moreover, it is in the discretion of the Council at any time to add to the business of the Secretariat.

Various
other
Organs
of the
League.
•

§ 167*h*. Besides the Assembly, the Council, and the Secretariat, which are constitutional organs of the League, the Covenant provides for the establishment by the Council of various other organs.

(1) The Permanent Armament Commission (Articles 8 and 9) advises the Council with regard to the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations.¹

(2) The Permanent Court of International Justice² (Article 14) is competent to hear and determine any

¹ See below, § 167*l*.

² See below, § 476*b*.

dispute of an international character which the parties thereto submit to it. The Court may likewise, when asked to do so by the Council or the Assembly, give an advisory opinion upon any dispute or question.¹

(3) The Permanent Mandatory Commission (Article 22) is to receive and examine the annual reports of those member-States of the League which have been given a mandate to administer those colonies and territories which, as a consequence of the World War, have ceased to be under the sovereignty of the States formerly governing them, and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world. This Commission is likewise to advise the Council on all matters relating to the observance of the mandates.²

(4) The General Labour Conference and the International Labour Office, established under the International Labour Convention and Article 23(a) of the Covenant, which stipulates that the members of the League 'will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organisations,' are also organs of the League. However, their establishment is only indirectly provided for by the Covenant and has been realised by the International Labour Convention.³ Although the International Labour Office is not directly under the control of the League, but under the control of a governing body consisting of twenty-four members, it is nevertheless entitled to the assistance of the Secretary-General of the League.

¹ See vol. ii. pt. i. ch. i.

² See below, §§ 167q, 471c, 568i.

³ See below, § 167p.

III

THE FUNCTION OF THE LEAGUE

The Two
Purposes
of the
League.

§ 167*i*. While the Family of Nations was unorganised, it did not, and could not, exercise any function, nor devote itself to the fulfilment of any tasks. It was then only the community of the civilised States within which International Law had grown up, on account of the fact that the several civilised States were knitted together through many interests and continuously increasing intercourse. Up to the end of the World War, the Family of Nations did not even possess any organ of its own except the so-called Permanent Court of Arbitration created by the first Hague Peace Conference of 1899. In particular there did not exist any organ of the Family of Nations for the purpose of discussing and settling matters of universal interest. Through the establishment of the League of Nations a great change has taken place. The Covenant of the League has called into existence constitutional organs of the Family of Nations, so as to enable it now to discuss and settle matters of common international interest when they arise. This becomes apparent from the following text of its preamble: 'The High Contracting Parties, in order to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war, by the prescription of open, just, and honourable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another, agree to this Covenant of the League of Nations.' In spite of the somewhat involved language of this preamble, it

is obvious that the League is to serve two different purposes, namely, the maintenance of international peace and the promotion of international co-operation. These two purposes are to be realised by four means, namely: By the acceptance of obligations not to resort to war; by the prescription of open, just, and honourable relations between nations; by the firm establishment of the understandings of International Law as the actual rule of conduct among governments; and by the maintenance of justice and a scrupulous respect for all treaty obligations. Moreover, for the accomplishment of these two purposes already mentioned, the Covenant sets the League a number of tasks. These may be divided into three groups, in so far as they are connected with international peace and security, with guardianship over peoples who are not yet able to govern themselves, and with international co-operation regarding matters of international interest. While details concerning these various tasks will have to be discussed separately in the following pages, attention must at once be drawn to two stipulations of the Covenant which somewhat modify and restrict the action of the League.

(1) According to paragraph 8 of Article 15, any dispute concerning a matter which by International Law is found by the Council to be solely within the domestic jurisdiction of one of the parties, is exempt from the sphere of action of the League in case a party to the dispute claims exemption. This stipulation is intended to leave the member-States free from interference on the part of the League with their Immigration Laws, Alien Laws, and the like.

(2) According to Article 21, nothing in the Covenant 'shall be deemed to affect the validity of international engagements such as treaties of arbitration or regional understandings like the Monroe Doctrine for securing the maintenance of peace.' This stipulation

was adopted to avoid interference by the League with existing or future arbitration treaties, with the policy of the United States which finds expression in the Monroe Doctrine,¹ with existing or future defensive alliances, guarantee treaties, and the like.

Peaceful
Settle-
ment of
Inter-
national
Disputes.

§ 167*k*. The avoidance of war by the peaceful settlement of international disputes is one of the most important tasks of the League. The Covenant lays down four general principles concerning this task.

The first is comprised in Article 11, according to which any war or threat of war, whether immediately affecting any of the members of the League or not, is declared a matter of concern to the whole League, and the League has the right to take any action that may be deemed wise and effectual to safeguard the peace of the world. And it is particularly declared to be the 'friendly right' of each member of the League to draw the attention of the Assembly or of the Council to any circumstances affecting international intercourse which threaten to disturb international peace, or the good understanding between nations upon which peace depends.

The second principle, comprised in Article 12, is that, should a dispute arise between members of the League, which has not been adjusted by the ordinary processes of diplomacy, the conflicting parties must in no case resort to war without having previously submitted it either to arbitration or to an inquiry by the Council, and until three months after the award has been given by the arbitrators or the Council has concluded its inquiry, and made a recommendation for settling the dispute. The award of the arbitrators shall be made within reasonable time, and the recommendation of the Council shall be made within six months after the dispute has been submitted to inquiry.

¹ See above, §§ 47, 139.

The third general principle, comprised in paragraph 4 of Article 13 and paragraph 6 of Article 15, is that no party is allowed to resort to war against such other party as complies with the award of the arbitrators or with the unanimous recommendation of all members of the Council, other than those representing parties to the dispute.

The fourth general principle, comprised in Article 16, is that, should any member-State of the League disregard the stipulations of Articles 12, 13, or 15, and resort to war without having previously submitted the dispute to arbitration or to inquiry by the Council, or resort to war against such other member-State as complies with the award of the arbitrators or the unanimous recommendations of all members of the Council, other than those representing the parties at issue, 'it shall *ipso facto* be deemed to have committed an act of war against all other members of the League.' And in this case the other members of the League must immediately subject the guilty member to (1) the severance of all trade or financial relations, (2) the prohibition of all intercourse between their nationals and its nationals, and (3) the prevention of all financial, commercial, or personal intercourse between its nationals and the nationals of any other State, whether a member of the League or not. Apart from this, the Council is to recommend in such cases what effective military, naval or air force the members of the League shall each contribute to the armed forces to be used against the guilty member. In order to minimise the loss and inconvenience resulting from these measures, the members of the League agree to give mutual support to one another in the financial and economic measures taken, and in resisting any special measures aimed at one of their number by the guilty State. Further, they shall afford passage through their territory to the forces of

any of the members who are co-operating against the guilty member. And, lastly, the Covenant-breaking member may by a unanimous vote of all the members of the Council, other than its own representative, be expelled from the League.¹

Reduction of Armaments.

§ 167*l*. If the provisions of the Covenant are effective in the avoidance of war, the world can be freed from the burden of enormous armaments which were considered necessary before the World War. For this reason Article 8 embodies the principle that national armaments shall be reduced to the lowest point consistent with national safety, and with the enforcement by common action of international obligations. But no hard and fast rule is laid down for such reduction of armaments; on the contrary, special account is to be taken 'of the geographical situation and circumstances of each State.' The Council is to formulate plans for effecting the reduction of armaments, for the consideration and action of the several members of the League, and these plans are to be subject to reconsideration and revision at least every ten years. After these plans have been adopted by the members concerned, the limits of armaments fixed by them cannot be exceeded without the consent of the Council. And the members of the League must interchange full and frank information as to the scale of their armaments, their military, naval, and air programmes, and the condition of such of their industries as are capable of being adapted to warlike purposes.

Part of the task of reduction of armaments lies in dealing with the problem of the manufacture, by private enterprise, of munitions and implements of war, which lends itself to grave objection. For this reason the Council is to 'advise how the evil effects attendant

¹ As regards details concerning the settlement of disputes by arbitra-

tion and by inquiry on the part of the Council, see below, vol. ii.

upon such manufacture can be prevented, due regard being had to the necessities of those members of the League which are not able to manufacture the munitions and implements of war necessary for their safety.'

To advise the Council of the League with regard to the problem of reduction of armaments, a Permanent Armament Commission is to be established according to Article 9.

§ 167*m*. Since the member-States of the League are to reduce their armaments, the League promises to them assistance against external aggression. Article 10 of the Covenant stipulates: 'The members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League. In case of any such aggression, or in case of any threat or danger of such aggression, the Council shall advise upon the means by which this obligation shall be fulfilled.'

Guarantee
against
Aggres-
sion.

It is to be noted that the League guarantees the territorial integrity of the member-States against external aggression only. No guarantee of territorial integrity is granted against revolutionary movements within the member-States aspiring to independence and the establishment of separate States. For this reason Article 10 is not a bar to historical development which might lead to the disintegration of some of the existing member-States.

§ 167*n*. At the outbreak of the World War, and during its continuance, it became apparent that secret treaties are a danger to peace. In any case, they would seem not to be in accordance with democratic government, because they may submit the States concerned to obligations which the peoples, had they known of the secret treaties, would have refused to undertake. The demand for so-called open diplomacy having

Open
Diplo-
macy.

everywhere arisen, Article 18 meets this demand, to a great extent, by laying down the rule that in future every treaty or international engagement must be forthwith registered with the Secretariat of the League, and as soon as possible be published, and that no such treaty or international engagement shall be binding, until so registered.

It is to be noted that the registration and publication of future treaties only is stipulated, and that nothing is said about secret treaties made before the establishment of the League. However, it would seem that previous secret treaties lose their binding force unless they are forthwith registered with the Secretariat because, according to Article 20, all obligations or understandings between members of the League which are inconsistent with the terms of the Covenant are abrogated.

Recon-
sidera-
tion of
Treaties
and Inter-
national
Condi-
tions.

§ 1670. There is no doubt that all treaties and international conditions are subject to the influence of changing circumstances and conditions. Articles 19 and 20 of the Covenant define the attitude of the League with regard to such changes.

(1) The establishment of the League itself involves such a great alteration of circumstances and conditions, that Article 20 stipulates : ‘ The members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof. In case any member of the League shall, before becoming a member of the League, have undertaken any obligations inconsistent with the terms of this Covenant, it shall be the duty of such member to take immediate steps to procure its release from such obligations.’ It is, however, to be noted that Article 21 specifically

lays down the rule that nothing in the Covenant 'shall be deemed to affect the validity of international engagements such as treaties of arbitration or regional understandings for securing the maintenance of peace.' For this reason not only international arbitration treaties, but also guarantee treaties and defensive alliances entered into before the establishment of the League, need not be dissolved.

(2) A treaty may in consequence of a vital change of circumstances and conditions become so burdensome to one of the parties that in justice such party may demand to be released, either from the whole treaty, or from a certain stipulation in it. For this reason it has always been asserted to be a customary rule of International Law, that *omnis conventio intelligitur rebus sic stantibus*.¹ On the other hand, there was always a danger that this rule would be improperly used to hide the violation of treaties behind the shield of law; and a number of cases could be quoted where such abuse has really taken place. To avoid this, and yet to secure the application of the principle *rebus sic stantibus* to cases where its application is really justified, Article 19 stipulates that the Assembly may advise the reconsideration by members of the League of treaties which have become inapplicable.²

(3) Just as treaties, through a change of circumstances, may become the cause of strife, so may international conditions in general, unless they are altered and adapted to new requirements. For this reason Article 19 stipulates that the Assembly may also from time to time advise the consideration, by the members of the League, of international conditions whose continuance might endanger the peace of the world.

§ 167*p*. As, in consequence of the World War, Germany lost her colonies, and Turkey a large part of her Empire,

¹ See below, § 539.

² See below, § 167*a*.

Guardian-
ship over
certain
Peoples.

a number of territories ceased to be under the sovereignty of the States to which they formerly belonged ; but the peoples inhabiting them were not yet able to stand alone. For such territories Article 22 of the Covenant introduces a new principle of International Law, for it stipulates that they shall be put under the guardianship of the League of Nations. However, the League is not itself to administer them, but is to give a mandate to such member-States of the League as ' by reason of their resources, their experience, or their geographical position ' are best fitted to do so. The degree of authority, control, or administration to be exercised by the Mandatory State, if not previously agreed upon, is in each case to be explicitly defined by the Council in a special act or charter.¹

Inter-
national
Co-opera-
tion.

§ 167*q*. Articles 23-25 set the League a number of tasks, all involving international co-operation regarding matters of common interest in time of peace.

According to Article 23(*a*), the members of the League will endeavour to secure everywhere fair and humane conditions of labour for men, women, and children. To

¹ Article 22, having regard to the varying stages of development among different peoples, provides for three types of mandate. The first is applicable to certain communities, formerly part of Turkey, which can be provisionally recognised as independent nations subject to administrative advice and assistance from a Mandatory State. Mandates of this type are likely to be given to Great Britain for Mesopotamia, to France for Syria, and to some other State for Armenia. The second type is adapted to those peoples which are at such a stage that the Mandatory State must be responsible for the administration of their territory. The third type is to be applied to territories which can best be administered as *integral portions* of the Mandatory State.

It appears from answers given in Parliament that mandates of the

second or third type have been allocated to Great Britain for Palestine ; to Great Britain and Belgium for German East Africa ; to South Africa for German South-West Africa ; to the British Empire for Nauru ; to New Zealand for Samoa ; to Australia for other German possessions in the Pacific south of the Equator ; to Japan for those north of the Equator ; and to Great Britain and France for Togoland and the Cameroons. But the terms of the mandates have not been published, and this list is given with all reserve.

The Mandatory Commission—see above, § 167*h*—is to receive and examine the annual reports which must be made by Mandatory States, and to advise the Council upon ensuring the observance of the terms of all mandates.

fulfil this task the Peace Conference at Paris produced a Labour Convention, which is embodied in the Treaties of Peace¹ and establishes a General Labour Conference, and an International Labour Office, at the seat of the League of Nations, as part of the organisation of the League.

According to Article 23(b), the members of the League undertake to secure just treatment of the native inhabitants of their territories. Provisions for this purpose are contained in the convention revising the General Acts of Berlin of 1885, and of Brussels of 1890, signed at St. Germain on September 10, 1919.²

According to Article 23(c), the League is entrusted with the general supervision over the execution of agreements with regard to the traffic in women and children, and the traffic in opium and other dangerous drugs. Already before the World War there were in existence two treaties³ for the suppression of the so-called White Slave traffic, which are still in force, and a treaty⁴ concerning the traffic in Opium, which is brought into force with additional parties by the Treaties of Peace. The convention for the control of the Liquor traffic in Africa, signed at St. Germain on September 10, 1919, prohibits beverages containing chemical products recognised as injurious to health.⁵

According to Article 23(d), the League is entrusted with the supervision of the trade in arms and ammunition with those countries in which the control of this traffic is in the common interest. A convention controlling such trade in the greater part of Africa, part of Asia, and a maritime zone, including the Persian Gulf, was signed at St. Germain on September 10, 1919.⁶

¹ See above, § 167h, and below, § 568i.

² Treaty Ser. (1919), No. 18, Cmd. 477. See below, §§ 564, 566.

³ See below, § 592.

⁴ See below, § 591a.

⁵ Treaty Ser. (1919), No. 19, Cmd. 478. See below, § 566.

⁶ See below, § 568c.

According to Article 23(e), the League will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all member-States of the League. Provisions of this kind are to be found in the several Treaties of Peace, and the treaties with the smaller Allied States,¹ in which general conventions dealing with these questions are foreshadowed.

According to Article 23(f), the League will endeavour to take steps in matters of international concern for the prevention and control of disease. In this connection must likewise be mentioned Article 25 of the Covenant, according to which 'the members of the League agree to encourage and promote the establishment and co-operation of duly authorised voluntary national Red Cross organisations having as purposes the improvement of health, the prevention of disease, and the mitigation of suffering throughout the world.'

According to Article 24, 'there shall be placed under the direction of the League all international bureaux already established by general treaties if the parties to such treaties consent. All such international bureaux and all commissions for the regulation of matters of international interest hereafter constituted shall be placed under the direction of the League. In all matters of international interest which are regulated by general conventions, but which are not placed under the control of international bureaux or commissions, the Secretariat of the League shall, subject to the consent of the Council, and if desired by the parties, collect and distribute all relevant information, and shall render any other assistance which may be necessary or desirable. The Council may include as part of the expenses of the Secretariat the expenses of any bureau or commission which is placed under the direction of the League.'²

¹ See below, §§ 568*d*-568*h*.

² See below, §§ 458-471*e*.

It is to be noted that, while the League will devote itself to the fulfilment of the six tasks enumerated in Article 23, no member of the League is bound by it unless such member is already a party to, or accedes to, a previous convention, or becomes a party to a future convention dealing with these matters. This becomes quite apparent from the first few lines of Article 23 : 'subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon.'

IV

DEFECTS AND MERITS OF THE CONSTITUTION OF THE LEAGUE

§ 167*r*. From the very beginning of the movement in favour of the League of Nations there were many who objected to it on principle, whether because they thought the League inconsistent with the sovereignty of the several States, or because they considered it a utopian plan. Now that the League has come into existence, it is superfluous to discuss the objections of those who opposed it on principle. There are, however, many who, although they always were, and still are, in favour of a League of Nations, object to the present League and its constitution for a number of reasons :

Objections in general to the Constitution of the League.

(1) Some argue that the League is not a league of all civilised States, but only of the belligerents victorious in the World War, and open to objection on that ground. It is certainly true that the establishment of the League is not the result of free discussion and deliberation on the part of all the civilised States. Without doubt, the League was evolved and conceived by the victorious belligerents of the World War only. The Covenant

of the League is the result of the discussion and deliberation of a committee appointed by the Allied and Associated Powers assembled at the Peace Conference at Paris, upon which only fourteen of these Powers were represented. And although after the first draft had been adopted by the Conference, the committee informally interviewed representatives of thirteen neutral Powers, and some amendments were made in consequence, the final text of the Covenant is essentially the product of the Allied and Associated Powers assembled at the Peace Conference. Moreover, the League was called into existence by the various Treaties of Peace imposed on the Central Powers, of which the Covenant forms the first part; and the recognition of the League of Nations was therefore made obligatory upon the Central Powers. The fact that the constitution of the League is intentionally represented as the work of the Peace Conference of the Allied and Associated Powers becomes further apparent from the text of Article 4 of the Covenant, according to which the Council shall consist of representatives of the *Principal Allied and Associated Powers*, together with representatives of four other Powers. But while the League was certainly called into existence by the Allied and Associated Powers alone, and other States had no decisive voice in the drafting of the Covenant, thirteen neutral States have joined the League as original members. Further, although the recognition of the League was imposed upon the Central Powers without their being admitted as members, the door has been left open for them, and they will no doubt become members in due time. The League already comprises forty-four members, and the remaining civilised States may be expected to become members. And while admittedly some of the defects of the constitution of the League are due to the way in which it was

conceived and established, Article 26 of the Covenant provides an opportunity for remedying those defects by alterations which will doubtless be effected in the course of time.

Be that as it may, the fact that the League was established at the same time as the conclusion of peace with Germany has enabled it at once to undertake a number of functions in connection with the execution of the Peace Treaties, and other treaties constituting the resettlement after the World War.

To give only a few instances : The League has undertaken the government of the Saar Basin for fifteen years ; it has undertaken the protectorate over the Free City of Danzig ; and it has undertaken to guarantee to German as well as Jewish subjects of Poland, and to the minorities in other smaller States, protection for their lives and liberty, and freedom in the exercise of their religion and the use of their language.¹

(2) Another objection raised against the constitution of the League is that it is a league of the Great Powers only. This objection is based on the fact that the Council is to comprise nine members, five of whom are always to be representatives of the Great Powers, namely, the British Empire, [the United States of America],² France, Italy, and Japan, leaving only four members to represent all the other Powers. The predominance of the Great Powers within the Council is thereby secured ; and it is to this that objection is made. Yet it is unjustified. Since the Great Powers are the leaders within the Family of Nations, and since, whenever the League is called upon to act against a recalcitrant member, the Great Powers are chiefly concerned on account of the fact that they possess the biggest armies and navies, it is only right and equitable that they should always be represented, and should be pre-

¹ See below, §§ 568e-568h.

² See above, 167b, n.

dominant, in the Council. But although the Great Powers are predominant, it will be impossible for them to abuse their position, because the Council as a rule can only act if it is unanimous, with the consequence that the representatives of the four minor Powers in the Council are as a rule able to prevent action on the part of the Council. Nor does the permanent representation of the Great Powers in the Council violate the legal equality of all States. It is acknowledged that the Great Powers are politically superior to the minor Powers, and it is on this account that the Great Powers are predominant in the Council.

(3) A third objection put forward against the constitution of the League is that it does not render it a super-State with a Government and Parliament of its own, and an international Army and Navy to serve as a police force. Indeed, there is no trace of a super-State in the League, for not even the most vivid imagination could see in the Council of the League an international Government, or in the Assembly an international Parliament with power to legislate by a majority; and there is no provision in the Covenant for an international Army and Navy. However, it may safely be asserted that, whatever may be the merits of a League creating a super-State—(the author considers it to be a Utopia)—not a single civilised State would at the present time have given its consent to the establishment of a League of Nations involving a super-State.

(4) A fourth objection has been made, namely, that the League is a league of Governments, and not of peoples, and is therefore not democratic. This objection is based on the fact that the Assembly of the League consists of representatives who will no doubt be deputed by the Governments of the member-States, and that each member, though it may depute three representatives, has only one vote. However, the

delegates of Governments are necessarily also delegates of peoples, because autocracy has almost everywhere disappeared, and constitutional democratic government has taken its place. So the Government of almost every member-State of the League is really representative of the people, being either parliamentary party government or—as in the United States of America—a Government directly elected by the people. Moreover, Article 3 of the Covenant does not lay down how the several members shall select their respective representatives; they might, for instance, be selected by Parliament or even directly by the people.

(5) Lastly, it has been objected that the constitution of the League is obviously not strong enough to secure peace, because otherwise neither would Article 10 of the Covenant stipulate that the members of the League guarantee to one another their territorial integrity and existing political independence, nor would defensive alliances and separate treaties of guarantee be admissible within the League, as they are without doubt according to Article 21. This objection is based on the wrong presumption that the League was intended to be something like a super-State which could with absolute certainty secure the maintenance of peace. It overlooks the fact that the League is nothing else but the organised Family of Nations, and that the protection which the League can afford to its members depends in every case entirely upon the readiness of the members to fulfil their obligation under the Covenant not to resort to war without having referred a dispute either to arbitration or to the Council for inquiry. Of course, it is possible that a member might not do so, but might make a sudden attack upon another member. Then the attacked State would in the first instance have to rely upon its own forces, because the League could only after the lapse of time send forces to its assistance.

It is for this reason that the members of the League guarantee to one another, according to Article 10 of the Covenant, their territorial integrity and existing political independence against external aggression, a guarantee which is all the more necessary since members are to reduce their national armaments to the lowest point consistent with national safety.¹ Every member is to be assured that since it is to reduce its armaments, the other members will come to its assistance in case of aggression.

Now it may happen that a member is not satisfied with this general assurance of assistance against aggression, and would like to secure more speedy help in case of need. In such case there is nothing to prevent it either entering into a defensive alliance with one or more other members, or securing the special protection of one or more members by a special guarantee of its independence or territorial integrity. Such defensive alliances and guarantee treaties would, like all other treaties, have to be registered with the Secretariat and published, according to Article 18, and for this reason they would not vitiate the Covenant, but would confirm and supplement it with regard to the particular cases concerned. Thus, upon the signature of the Treaty of Peace with Germany, France was at once desirous of securing the speedy assistance of Great Britain, as well as of the United States, in case the stipulations of the treaty concerning the left bank of the Rhine should be violated by Germany, and therefore entered into two special treaties of alliance with Great Britain and the United States respectively, by which these Powers agreed to come immediately to the assistance of France, in the event of any unprovoked movement of aggression by Germany.²

¹ See above, § 167*m*.

² As to the position of these treaties, see below, § 569*b*.

§ 167s. While the foregoing objections in general to the constitution of the League are unfounded, there is no doubt that there are a number of real defects.

Defects
of the
Constitution
of the
League.

(1) The first defect is that the membership of the League is notifiable (Article 1, paragraph 3), and that a member may be expelled (Article 16, paragraph 4), or may cease to be a member through signifying its dissent from an amendment ratified in accordance with Article 26. Since the League is intended to be all-embracing, and to represent the organised Family of Nations, there ought to be no possibility for a member to leave the League, or to be expelled therefrom. A recalcitrant member should, if necessary, be coerced by force to submit to the decisions of the League, and to fulfil its duties. However, it may be hoped that the stipulations concerning the withdrawal and the expulsion of members will disappear in consequence of a future recasting of the constitution.

(2) Another defect is that there is no provision for a separate and individual Council of Conciliation. According to Articles 12 and 15, it is to the Council that disputes are to be referred for inquiry, and it is this Council which will investigate the dispute, and make recommendations for its settlement. Yet the Council is, and must be, a political institution in which, according to Article 4, the Great Powers have a political preponderance; and so the political interests of the Great Powers must influence the Council in their recommendations. There is great danger that in a dispute between a Great Power and a minor Power, or even in a dispute between two minor Powers, the Council will be prejudiced. Apart from this, paragraph 9 of Article 15, according to which the Council may refer a dispute to the Assembly, and shall do so at the request of either party to the dispute, is quite unworkable. The Assembly will be a very large body, and it will hardly ever be possible

to obtain a unanimous report from it ; yet since such a report is not a matter of procedure, concerning which, according to Article 5, a decision may be given by a majority vote, unanimity will be required. For this reason, to withdraw a dispute from the Council and transfer it to the Assembly is to appeal from a more competent to a much less competent body. What is urgently needed is the establishment of a Council of Conciliation, as independent of the Council of the League as the International Court of Justice. The functions of the Council of the League ought to be exclusively political, and confined to the consideration of mere executive measures. On the other hand, the functions of a Council of Conciliation would consist in an impartial inquiry into the cause and elements of a dispute, and in recommendations for its settlement. It is only if the parties were not inclined to carry out their recommendations that appeal should be made to the Executive Council of the League. The British official commentary on the Covenant points out¹ that there is nothing to prevent the Council from setting up a permanent Council of Conciliation. This is no doubt true ; but Article 15, as it stands, contemplates the settlement of disputes by the Executive Council of the League, and not by an independent Council of Conciliation.

(3) The third defect is the absence of a stipulation in the Covenant, according to which the settlement of judicial disputes by an International Court of Justice is made compulsory, in case the parties do not succeed in settling them by other means. Indeed, Article 14 foreshadows the establishment of an International Court of Justice, and paragraph 2 of Article 13 names a few kinds of disputes as 'generally suitable for submission to arbitration,' but there is no compulsion on the

¹ Misc., No. 3 (1919), Cmd. 151, p. 16.

parties to submit even these disputes to the International Court of Justice.¹

(4) A fourth defect is that, according to Article 19 of the Covenant, 'the Assembly may from time to time advise the reconsideration by members of the League of treaties which have become inapplicable, and the consideration of international conditions whose continuance might endanger the peace of the world.'² There would not be much objection to this if unanimity were not required. But as the Assembly will consist of representatives of more than forty States, and only by a unanimous vote of these forty or fifty States can it advise the reconsideration of treaties and the consideration of international conditions, it would seem that, being such a large political body, it is hardly fit for the task, and it would have been preferable to have entrusted it to the Council, which is a much smaller body, if the principle of unanimity is to be maintained. It would be still better if every member-State were given the right to call upon the International Court of Justice to investigate the matter, and give an opinion as to whether, in consequence of a vital change of circumstances and conditions, a certain treaty had become inapplicable, or whether the continuance of certain international conditions endangered the peace of the world. Both the Assembly and the Council are political institutions, and on that account less fit to advise on such questions than the International Court of Justice, which would approach the matter without any political bias.

(5) A last defect is the absence of a stipulation in the Covenant making it the duty of the Council to intervene if a belligerent violated fundamental rules of warfare. The rules of International Law regarding

¹ See below, § 476*b*. Certain questions are, however, expressly referred to the Court by the Treaties

of Peace, and other treaties concluded during the Peace Conference.

² See above, § 167*c* (2) and (3).

warfare do not concern the belligerents alone, but the Family of Nations as a body. At present the only remedies for their violation are reprisals and the punishment of war crimes ; not only are these remedies insufficient, but they frequently lead to further violations and abuses. Only by making it the duty of the League to intervene, and likewise to undertake the punishment of war crimes, could the strict observance of the rules of warfare on the part of both belligerents be secured.

Merits of
the Con-
stitution
of the
League.

§ 167*t*. Whatever may be the defects of the constitution of the League, its establishment has inaugurated a new epoch in the development of mankind, by organising the Family of Nations. The Assembly, comprising representatives of all the member-States, and meeting at stated intervals, is an organ of the Family of Nations through which the civilised States can give their consent to all treaties which may be necessary to secure joint international action, and, more quickly and more effectively than in former times, can amend and even codify the hitherto customary Law of Nations. The Council is a kind of executive of the Family of Nations which, although its decisions are in the main only recommendations, will exercise an important influence and authority. In the Permanent Secretariat, a kind of International Civil Service has been called into existence, the importance of which will become more and more apparent as the League carries out its tasks. Through the adoption of the principle that the parties to a dispute must not resort to war without having previously submitted it either to arbitration or to inquiry by the Council, war should occur less frequently than in former times, and should not break out suddenly like a bolt from the blue. By securing the reduction of national armaments to the lowest possible point, the League should not only diminish the danger of war, but should free the world from an oppressive economic burden. By the acceptance

of the principle of open diplomacy, the relations of civilised States should be relieved from suspicion and mistrust. Through the adoption of the principle that treaties which have become inapplicable should be reconsidered, the danger of the abuse of the notorious clause *omnis conventio intelligitur rebus sic stantibus* should be reduced. The principle of guardianship over certain undeveloped peoples is a new and progressive step in International Law. By setting itself a number of tasks of international co-operation regarding matters of common interest, the League has opened a wide prospect of development for International Law.

Moreover, it is a merit of the constitution that it is not rigid. The establishment of the League is an unprecedented venture, and the absence of rigidity in the constitution permits adaptation to future circumstances, conditions, and requirements which could not be foreseen when it was drawn up. Serious defects are to be found in the constitution as at present framed; but Article 26 provides for the possibility of amendments. It must not be forgotten that the Covenant is a compromise between very divergent views held by the several Powers, and those who know the difficulty of bringing about such a compromise must be ready to accept it for the time being as the best thing obtainable under the prevailing circumstances and conditions. Whatever may be its defects, the League is enabled to embark upon most important activities, and its success will depend much less upon the constitutional machinery provided by the Covenant than upon the spirit with which the members of the League use it. Ultimately the success of the League depends upon the goodwill of the majority of its members, and especially of the Great Powers.

PART II

THE OBJECTS OF THE LAW OF NATIONS

CHAPTER I

STATE TERRITORY

I

ON STATE TERRITORY IN GENERAL

Vattel, ii. §§ 79-83—Hall, § 30—Westlake, i. pp. 86-90—Lawrence, §§ 71-73—Phillimore, i. §§ 150-154—Twiss, i. §§ 140-144—Halleck, i. pp. 156-163—Taylor, § 217—Wheaton, §§ 161-163—Moore, i. § 125—Hershey, Nos. 159-160—Bluntschli, § 277—Hartmann, § 58—Holtzendorff in *Holtzendorff*, ii. pp. 225-232—Gareis, § 18—Liszt, § 9—Ullmann, § 86—Heffter, §§ 65-68—Bonfils, Nos. 483-485—Despagnet, Nos. 374-377—Pradier-Fodéré, ii. No. 612—Mérignhac, ii. pp. 356-366—Nys, i. pp. 436-445—Rivier, i. pp. 135-142—Calvo, i. §§ 260-262—Fiore, i. Nos. 522-530—Martens, i. § 88—Del Bon, *Proprietà territoriale degli Stati* (1867)—Fricker, *Vom Staatsgebiet* (1867)—Ghirardini, *La Sovranità territoriale nel Diritto internazionale* (1913).

§ 168. State territory is that definite portion of the surface of the globe which is subjected to the sovereignty of the State. A State without a territory is not possible, although the necessary territory may be very small, as in the case of the Free City of Danzig, the Principality of Monaco, the Republic of San Marino, or the Principality of Lichtenstein. A wandering tribe, although it has a Government and is otherwise organised, is not a State before it has settled down on a territory of its own.

State territory is also named territorial property of a State. Yet it must be borne in mind that territorial property is a term of Public Law, and must not be confounded with private property. The territory of a

Concep-
tion of
State
Territory.

State is not the property of the monarch, or of the Government, or even of the people of a State; it is the country which is subjected to the territorial supremacy or the *imperium* of a State. This distinction has, however, in former centuries not been sharply drawn.¹ In spite of the *dictum* of Seneca, 'Omnia rex imperio possidet, singuli dominio,' the *imperium* of the monarch and the State over the State territory has very often been identified with private property of the monarch or the State. But with the disappearance of absolutism this identification has likewise disappeared. It is for this reason that nowadays, according to the Constitutional Law of most countries, neither the monarch nor the Government is able to dispose of parts of the State territory at will without the consent of Parliament.²

It must, further, be emphasised that the territory of a State is totally independent of the racial character of the inhabitants of the State. The territory is the public property of the State, and not of a nation in the sense of a race. The State community may consist of different nations, as, for instance, the British or the Swiss.

Different
Kinds of
Territory.

§ 169. The territory of a State may consist of one piece of the surface of the globe only, such as that of Switzerland. Such kind of territory is named 'integrate territory' (*territorium clausum*). But the territory of a State may also be dismembered and consist of two or more pieces, such as that of Great Britain or Germany. All States with colonies have a 'dismembered territory.'

If a territory or a piece of it is absolutely surrounded

¹ And some writers refuse to draw it even nowadays, as, for instance, Lawrence, § 71.

² In English Constitutional Law

this point is not settled. The cession of the island of Heligoland to Germany in 1890 was, however, made conditional on the approval of Parliament.

by the territory of another State, it is named an 'enclosure.' Thus the Republic of San Marino is an enclosure of Italy, and Livia, a small Spanish area in the midst of the French Department of Pyrénées-Orientales, is an enclosure of France.

Colonies as a rule rank as territory of the motherland ; but dominions enjoying complete self-government, as for instance the Dominion of Canada, Newfoundland, the Commonwealth of Australia, New Zealand, and the Union of South Africa, though they form part of the territory of the British Empire, occupy a special position.¹

As regards the relation between the suzerain and the vassal State, it is certain that the vassal is not, in the strict sense of the term, a part of the territory of the suzerain. But no general rule can be laid down, as everything depends on the merits of the special case, and as the vassal, even if it has some footing of its own within the Family of Nations, is internationally for the most part considered a mere portion of the suzerain State.²

§ 170. The importance of State territory lies in the fact that it is the space within which the State exercises its supreme authority. State territory is an object of the Law of Nations, because the latter recognises the supreme authority of every State within its territory. Whatever person or thing is on, or enters into, that territory, is *ipso facto* subjected to the supreme authority of the State according to the old rules, *Quidquid est in territorio, est etiam de territorio* and *Qui in territorio meo est, etiam meus subditus est*. No foreign authority has any power within the boundaries of the home territory, although foreign sovereigns and diplomatic envoys enjoy the so-called privilege of extritoriality, and although the Law of Nations does, and

Import-
ance of
State
Territory.

¹ See above, §§ 94a and 94b.

² See above, § 91.

international treaties may, restrict ¹ the home authority in many points in the exercise of its sovereignty.

One Terri-
tory, one
State.

§ 171. The supreme authority which a State exercises over its territory makes it apparent that on one and the same territory can exist one full sovereign State only. Two or more full sovereign States on one and the same territory are an impossibility. The following five cases, of which the Law of Nations is cognisant, are apparent, but not real, exceptions to this rule.

(1) There is, first, the case of the so-called *condominium*. It happens sometimes that a piece of territory consisting of land or water is under the *joint tenancy* of two or more States, these several States exercising sovereignty conjointly over it, and the individuals living thereon. Thus Schleswig-Holstein and Lauenburg from 1864 till 1866 were under the *condominium* of Austria and Prussia. Thus, further, Moresnet (Kelmis), on the frontier of Belgium and Germany, was formerly under the *condominium* of these two States ² because they could not come to an agreement regarding the interpretation of a boundary treaty of 1815 between the Netherlands and Prussia; but by the Treaty of Peace with Germany, Germany has recognised the full sovereignty of Belgium over this territory. Moreover, since 1898 the Soudan has been under the *condominium* of Great Britain and Egypt.³ It is easy to show that in such cases ⁴ there are not two States on one and the same territory, but pieces of territory, the destiny

¹ See above, §§ 126-128.

² See Schröder, *Das grenzstreitige Gebiet von Moresnet* (1902); and for the present position of Moresnet, the Treaty of Peace with Germany, Article 32, and below, § 568e.

³ See Sarkissian, *Le Soudan égyptien* (1913). See also the agreement between Great Britain and Egypt of January 19, 1899, signed at Cairo, in Martens, *N.R.G.*, 3rd Ser. iv. p. 791.

⁴ The New Hebrides are materially likewise under a *condominium*, namely, that of Great Britain and France, although Article 1 of the Convention of October 20, 1906—see Martens, *N.R.G.*, 3rd Ser. i. p. 523—speaks only of 'a region of joint influence' with regard to the New Hebrides. See Brunet, *Le Régime international des Nouvelles-Hébrides* (1908), and Politis in *R.G.*, xiv. (1907), pp. 689-759.

of which is not decided, and which are kept separate from the territories of the interested States¹ under a separate administration. Until a final settlement, the interested States do not each exercise an individual sovereignty over these pieces, but they agree upon a joint administration under their conjoint sovereignty.

(2) The second case is that of the administration of a piece of territory by a foreign Power, with the consent of the owner-State. Thus, from 1878 to 1914 the Turkish island of Cyprus was under British administration;² and the Turkish provinces of Bosnia and Herzegovina were from 1878 to 1908 under the administration of Austria-Hungary.³ In these cases a cession of pieces of territory had for all practical purposes taken place, although in law they still belonged to the former owner-State. Anyhow, it is certain that only one sovereignty was exercised over these pieces—namely, the sovereignty of the State which exercised administration.

(3) The third case is that of a piece of territory leased or pledged by the owner-State to a foreign Power. Thus, China in 1898 leased⁴ the district of Kiaochau to Germany, Wei-Hai-Wei and the land opposite the island of Hong-Kong to Great Britain, and Port Arthur to Russia.⁵ Thus, further, in 1803 Sweden pledged the town of Wismar⁶ to the Grand Duchy of Mecklenburg-

¹ Existing and former examples of *condominium* are discussed by Tullio, *Il Condominium nel Diritto pubblico internazionale* (1910).

² On the annexation of Cyprus, see *R.G.*, xxi. (1914), pp. 510-512.

³ The Turkish island of Ada-Kalé, in the river Danube, was under the administration of Austria-Hungary from 1878 to 1913. See Blociszewski in *R.G.*, xxi. (1914), pp. 379-390.

⁴ See below, § 216. By Article 156 of the Treaty of Peace with Germany, Germany renounced all her rights

under this lease in favour of Japan. See below, § 568e.

⁵ Russia in 1905, by the Peace Treaty of Portsmouth, transferred her lease to Japan.

⁶ This transaction took place for the sum of 1,250,000 thaler, on condition that Sweden, after the lapse of 100 years, should be entitled to take back the town of Wismar on repayment of the money, with 5 per cent. interest per annum. Sweden in 1903—see Martens, *N.R.G.*, 2nd Ser. xxxi. pp. 572 and 574—formally waived her right to retake the town.

Schwerin, and the Republic of Genoa in 1768 pledged the island of Corsica to France. All¹ such cases comprise, for all practical purposes, cessions of pieces of territory, but in strict law they remain the property of the leasing State. And such property is not a mere fiction, as some writers² maintain, for it is possible for the lease to come to an end by expiration of time or by rescission. Thus the lease, granted in 1894 by Great Britain to the former Congo Free State, of the so-called Lado Enclave, was rescinded³ in 1906. Or again the leases of the German concessions at Hankow and Tientsin, and the Austro-Hungarian concession at Tientsin, were abrogated by Article 132 of the Treaty of Peace with Germany and Article 116 of the Treaty of Peace with Austria, and the areas were restored to the full sovereignty of China. However this may be, as long as the lease has not expired it is the lease-holder who exercises sovereignty over the territory concerned.

(4) The fourth case is that of a piece of territory of which the use, occupation, and control are in perpetuity granted by the owner-State to another State, to the exclusion of the exercise of any sovereign rights over the territory concerned on the part of the grantor. In this way⁴ the Republic of Panama transferred, in 1903, to the United States of America a ten-mile wide strip of territory for the purpose of constructing, administering, and defending the so-called Panama Canal. In this case the grantor retains only in name the property in the territory, the transfer of the land concerned is

¹ Different are leases of land by one State to another for certain purposes. See, for instance, the two agreements between Great Britain and France of May 20, 1903. Martens, *N.R.G.*, 3rd Ser. v. (1912), pp. 760 and 762. See also Schoenborn in *Z.V.*, vii. (1913), pp. 438-445.

² See, for instance, Perrinjaquet in *R.G.*, xvi. (1909), pp. 349-367.

³ By Article 1 of the Treaty of London of May 9, 1906; see Martens, *N.R.G.*, 2nd Ser. xxxv. p. 454.

⁴ See below, § 184, and Boyd in *R.G.*, xvii. (1910), pp. 614-624.

really cession all but in name, and it is certain that only the grantee exercises sovereignty there.

(5) The fifth case is that of the territory of a Federal State. As a Federal State is considered ¹ itself a State side by side with its single member-States, the fact is apparent that the different territories of the single member-States are at the same time collectively the territory of the Federal State. But this fact is only the consequence of the other illogical fact that sovereignty is divided between a Federal State and its member-States. Two different sovereignties are here by no means exercised over one and the same territory, for so far as the Federal State possesses sovereignty the member-States do not, and *vice versa*.

II

THE DIFFERENT PARTS OF STATE TERRITORY

§ 172. To the territory of a State belong not only the land within the State boundaries, but also the so-called territorial waters. They consist of the rivers, canals, and lakes which water the land, and, in the case of a State with a sea-coast, of the maritime belt and certain gulfs, bays, and straits of the sea. These different kinds of territorial waters will be separately discussed below in §§ 176-197. In contradistinction to these real parts of State territory there are some things that are either in every respect or for some purposes treated as though they were territorial parts of a State. They are fictional and in a sense only parts of the territory. Thus men-of-war and other public vessels on the high seas as well as in foreign territorial waters are essentially in every point treated as though they were floating parts

Real and
Fictional
Parts of
Territory.

¹ See above, § 89.

of their home State.¹ And the houses in which foreign diplomatic envoys have their official residence are in many points treated as though they were parts of the home States of the respective envoys.² Again, merchantmen on the high seas are for some points treated as though they were floating parts of the territory of the State under whose flag they legitimately sail.³

Terri-
torial Sub-
soil.

§ 173. The subsoil beneath the territorial land and water⁴ is of importance on account of telegraph and telephone wires and the like, and further on account of the working of mines and of the building of tunnels. A special part of territory the territorial subsoil is not, although this is frequently asserted. But it is a universally recognised rule of the Law of Nations that the subsoil to an unbounded depth belongs to the State which owns the territory on the surface.

Terri-
torial At-
mosphere.

§ 174. The space of the territorial atmosphere is no more a special part of territory than the territorial subsoil, but it is of the greatest importance on account of wires for telegraphs; telephones, electric traction, and the like, on account of wireless telegraphy, and above all, on account of aerial navigation.

(1) Nothing need be said concerning wires for telegraphs and the like, except that obviously the territorial State can prevent neighbouring States from making use of its territorial atmosphere for such wires.

(2) As regards wireless telegraphy,⁵ the International Radiographic Convention, signed at London

¹ See below, § 450.

² See below, § 390.

³ See below, § 264.

⁴ As regards the subsoil of the open sea, see below, §§ 287c and 287d.

⁵ See Meili, *Die drahtlose Telegraphie*, etc. (1908); Schneeli, *Drahtlose Telegraphie und Völkerrecht* (1908); Landsberg, *Die drahtlose Telegraphie* (1909); Kausen, *Die drahtlose Telegraphie im Völker-*

recht (1910); Thurn, *Die Funkentelegraphie im Recht* (1913); Devaux, *La Télégraphie sans Fil* (1914); Loewengard, *Die internationale Radiotelegraphie im internationalen Recht* (1915); Rolland in *R. G.*, xiii. (1906), pp. 58-92; Fauchille in *Annuaire*, xxi. (1906), pp. 76-87; Bonfils, Nos. 531¹⁶ and 531¹⁷; Despagnet, No. 433 *quater*; Meurer and Boidin in *R. G.*, xvi. (1909), pp. 76 and 261.

on July 5, 1912, represents an agreement ¹ of the signatory Powers concerning the exchange of radio-telegrams on the part of coast stations and ship stations, and one ship station and another, but it contains no stipulation respecting the general question whether the territorial State is compelled to allow the passage over its territory of waves emanating from a foreign wireless telegraphy station. There ought to be no doubt that no such compulsion exists according to customary International Law, and that therefore the territorial State can prevent the passage of such waves ² over its territory.

(3) But with regard to aerial navigation the space of the territorial atmosphere is of particular importance, and will be considered in §§ 197*a*-197*c*.

§ 175. It should be mentioned that not every part of territory is alienable by the owner-State. For it is evident that the territorial waters are as much inseparable appurtenances of the land as are the territorial subsoil and atmosphere. Only pieces of land together with the appurtenant territorial waters are alienable parts of territory.³ There is, however, one exception to this, since boundary waters ⁴ may wholly belong to one of the riparian States, and may therefore be transferred through cession from one riparian State to the other without the bank itself. But it is obvious that this is only an apparent, not a real, exception to the rule that territorial waters are inseparable appurtenances of the land. For boundary waters that are ceded to the other riparian State remain an appurtenance of land, although they are now an appurtenance of the one bank only.

Inalienability of Parts of Territory.

¹ See below, §§ 287*b* and 582.

² The Institute of International Law—see *Annuaire*, xxi. (1906), p. 328—proposes by Article 3 of its 'Régime des Aérostats et de la Télégraphie sans fil' to restrict the

power of the territorial State to exclude such waves from passing over its territory to the case in which the exclusion is necessary in the interest of its security.

³ See below, § 185.

⁴ See below, § 199.

III

RIVERS

Grotius, ii. c. 2, §§ 11-15—Pufendorf, iii. c. 3, § 8—Vattel, ii. §§ 117, 128, 129, 134—Hall, § 39—Westlake, i. pp. 144-163—Lawrence, § 92—Phillimore, i. §§ 155-171—Twiss, i. §§ 145-156—Halleck, i. pp. 182-191—Taylor, §§ 233-241—Walker, § 16—Hershey, Nos. 199-200—Wharton, i. § 30—Moore, i. §§ 128-132—Wheaton, §§ 192-205—Bluntschli, §§ 314, 315—Hartmann, § 58—Heffter, § 77—Caratheodory in *Holtzendorff*, ii. pp. 279-377—Gareis, § 20—Liszt, §§ 9 and 27—Ullmann, §§ 87 and 105—Bonfils, Nos. 520-531—Despagnet, Nos. 419-421—Mérignhac, ii. pp. 605-632—Pradier-Fodéré, ii. Nos. 688-755—Nys, i. pp. 457-471, and ii. pp. 129-163—Rivier, i. p. 142 and § 14—Calvo, i. §§ 302-340—Fiore, ii. Nos. 755-797, and *Code*, Nos. 288-290 and 981-987—Martens, i. § 102, ii. § 57—Delavaud, *Navigation . . . sur les Fleuves internationaux* (1885)—Engelhardt, *Du Régime conventionnel des Fleuves internationaux* (1879), and *Histoire du Droit fluvial conventionnel* (1889)—Vernesco, *Des Fleuves en Droit international* (1888)—Orban, *Étude sur le Droit fluvial international* (1896)—Bergès, *Du Régime de Navigation des Fleuves internationaux* (1902)—Lopez, *Regimen internacional de los Rios navegables* (1905)—Carlomagno, *El Derecho fluvial internacional* (Buenos Ayres, 1913)—Schulthess, *Das internationale Wasserrecht* (1915)—Kæckenbeeck, *International Rivers* (1918)—Huber in *Z.V.*, i. (1906), pp. 29 and 159—Hyde in *A.J.*, iv. (1910), pp. 145-155—Vallotton in *R.I.*, 2nd Ser. xv. (1913), pp. 271-306—Bousek in *Z.V.*, vii. (1913), pp. 39-55—Wittmaak in the *Jahrbuch für Völkerrecht*, i. (1913), pp. 481-495—Lyde in *The Covenant*, i. (1920), p. 168.

Rivers
State Property of
Riparian
States.

§ 176. Theory and practice agree upon the rule that rivers are part of the territory of the riparian State. Consequently, if a river lies wholly, that is, from its source to its mouth, within the boundaries of one and the same State, such State owns it exclusively. As such rivers are under the sway of one State only and exclusively, they are named 'national rivers.' Thus, all English, Scottish, and Irish rivers are national, and so are, to give some Continental examples, the Seine, Loire, and Garonne, which are French; and the Tiber, which is Italian. But many rivers do not run through the land of one and the same State only, whether they are so-called 'boundary rivers,' that is, rivers which separate two different States from each other, or whether

they run through several States and are therefore named 'not-national rivers.' Such rivers are not owned by one State alone. Boundary rivers belong to the territory of the States they separate, the boundary line,¹ as a rule, running either through the middle of the river or through the middle of the so-called mid-channel of the river. And rivers which run through several States belong to the territories of the States concerned; each State owns that part of the river which runs through its territory.

There is, however, another group of rivers to be mentioned, which comprises all such rivers as are navigable from the open sea, and at the same time either separate or pass through several States between their sources and their mouths. These rivers, too, belong to the territories of the different States concerned, but they are nevertheless named 'international rivers,' because freedom of navigation in time of peace on all such rivers in Europe and on many of them outside Europe for merchantmen of all nations is recognised by International Law.²

§ 177. There is no rule of the Law of Nations in existence which grants foreign States the right of admittance for their public or private vessels to navigation on national rivers. In the absence of commercial or other treaties granting such a right, every State can exclude foreign vessels from its national rivers, or admit them under certain conditions only, such as the payment of dues and the like. The teaching of Grotius

Navigation on National, Boundary and not-National Rivers.

¹ See below, § 199; Huber in *Z.V.*, i. (1906), pp. 29 and 159; and Schulthess, *op. cit.*, pp. 8-15. The Treaties of Peace with Germany (Article 30), Austria (Article 30), and Bulgaria (Article 30) provide that in case of boundaries therein defined by a waterway, the terms 'course' and 'channel' signify (a) in the case of non-navigable rivers, the median line

of the waterway or of its principal arm, (b) in the case of navigable rivers, the median line of the principal channel.

² The distinction made in the text between 'national,' 'boundary,' 'not-national,' and 'international' rivers is not made by other writers. They class as 'international' all such rivers as are not national.

(ii. c. 2, §§ 10, 12, and 13) that innocent passage through rivers must be granted has not been recognised by the practice of the States, and Bluntschli's assertion (§ 314) that such rivers as are navigable from the open sea must in time of peace be open to vessels of all nations, is at best an anticipation of a future rule of International Law; it does not as yet exist.

As regards boundary rivers and not-national rivers running through several States, the riparian States¹ can regulate navigation on such parts of these rivers as they own, and they can certainly exclude vessels of non-riparian States altogether, unless prevented therefrom by virtue of special treaties.

Naviga-
tion on
Inter-
national
Rivers.

§ 178. Whereas there is certainly no recognised principle of free navigation on national, boundary, and not-national rivers, a movement for the recognition of free navigation on international rivers set in at the beginning of the nineteenth century. Until the French Revolution towards the end of the eighteenth century, the riparian States of such rivers as are now called international rivers could, in the absence of special treaties, exclude foreign vessels altogether from those parts which ran through their territory, or admit them under discretionary conditions. Thus, the river Scheldt was wholly shut up in favour of the Netherlands according to Article 14 of the Peace Treaty of Münster of 1648 between the Netherlands and Spain. The development of things in the contrary direction begins with a decree of the French Convention, dated November 16, 1792, which opens the rivers Scheldt and Meuse to the vessels of all riparian States. But it was not until the Vienna Congress² in 1815 that the principle of free navigation on the international rivers of Europe

¹ See below, § 178a.

² Articles 108-117 of the Final Act of the Vienna Congress; see Martens, *N.R.*, ii. p. 427.

by merchantmen of not only the riparian but of all States was proclaimed. The Congress itself gave *theoretical* recognition to that principle in making arrangements¹ for free navigation on the rivers Scheldt, Meuse, Rhine, and on the navigable tributaries of the latter—namely, the rivers Neckar, Maine, and Moselle—although more than fifty years elapsed before it became realised *in practice*, in 1868, and even then in a somewhat restricted way.²

The next step was taken by the Peace Treaty of Paris of 1856, which by its Article 15³ stipulated free navigation on the Danube and expressly declared the principle of the Vienna Congress regarding free navigation on international rivers for merchantmen of all nations to be part of 'European Public Law.' A special international organ for the regulation of navigation on the Danube was created, the so-called European Danube Commission.

A further development took place at the Congo Conference at Berlin in 1884-1885, since the General Act⁴ of this Conference provided for free navigation on the rivers Congo and Niger and their tributaries, and the creation of the so-called 'International Congo Commission' as a special international organ for the regulation of the navigation of the said rivers. But this Commission was never appointed.

The position of international rivers in Europe was reviewed at the Peace Conference in 1919, and a general convention is foreshadowed. This convention, which is to be drawn up by the Allied and Associated Powers and approved by the League of Nations, is

¹ 'Règlements pour la libre Navigation des Rivières'; see Martens, *N.R.*, ii. p. 434.

² See the Convention of Mannheim of October 17, 1868.

³ See Martens, *N.R.G.*, xv. p. 776. The documents concerning navigation on the Danube are collected by

Sturdza, *Recueil de Documents relatifs à la Liberté de Navigation du Danube* (Berlin, 1904). See also Demorgny, *La Question du Danube* (1911), and Dungen in *Z.I.*, xxvi. (1916), pp. 510-562.

⁴ See Martens, *N.R.G.*, 2nd Ser. x. p. 417.

to specify the rivers and waterways to be regarded as 'international,' and is to provide a general régime applicable to them. Germany, Austria, and Bulgaria have agreed to accede to it.¹ Pending the conclusion of this general convention, the general provisional régime laid down in the Treaties of Peace is to be applied to rivers declared by them to be 'international' (other than the Rhine and the Moselle), subject to certain special stipulations in the case of particular rivers.² Among rivers and waterways so declared 'international' are parts of the Elbe, Moldau (Ultava), Oder, Niemen, Danube, Morava (March), Thaya (Theiss), Vistula, Pruth, and the projected Rhine-Danube waterway.³ On them the nationals, property, and flags of all Powers are to be treated on a footing of perfect equality.⁴ Charges may be levied, if not precluded by existing conventions; but only such as cover equitably the cost of maintaining and improving the conditions of navigation. The general provisions for freedom of transit⁵ are applicable to the transit of vessels, passengers, and goods on these waterways. If no special organisation has been set up for the control of the waterway, each riparian State is bound to remove any obstacle or danger to navigation, and maintain good conditions of navigation. No riparian State may undertake works of a nature to impede navigation except where all the riparian

¹ Treaty of Peace with Germany, Article 338; Treaty of Peace with Austria, Article 299; Treaty of Peace with Bulgaria, Article 227.

² See, for example, Articles 331-353 of the Treaty of Peace with Germany.

³ 'And all navigable parts of these riversystems which naturally provide more than one State with access to the sea, with or without transshipment from one vessel to another, together with lateral canals and channels constructed either to duplicate or to improve naturally navigable sections of the specified river systems,

or to connect two naturally navigable sections of the same river.' See Treaty of Peace with Germany, Article 331; Treaty of Peace with Austria, Article 291; Treaty with Poland, Article 18; Treaty with Roumania, Article 16.

⁴ See, for example, Treaty of Peace with Germany, Article 332. But German vessels may not carry passengers or goods by regular services between the ports of any Allied or Associated Power without special authority, so long as this restriction remains in force.

⁵ See below, § 568e.

States (or the States represented on the special organisation, if there is one) agree that irrigation, water-power, or fisheries, or other national interests, should be given priority over the requirements of navigation.¹

The Rhine and Moselle are not made subject to the general provisional régime. The Convention of Mannheim of 1868 is to continue for the time, being to govern the navigation of the Rhine and Moselle, but subject to important modifications introduced by the Treaty of Peace with Germany.² But the Central Commission set up by the convention³ is to draw up and submit to the Powers now represented upon it a project of revision of the convention, to which Germany has agreed to accede.

The Peace Conference also dealt with two international rivers in Africa—the Congo and the Niger. The General Act of the Berlin Congo Conference of February 26, 1885, was abrogated by a convention signed at St. Germain on September 10, 1919;⁴ but the old Article 1, which defined the area within which the trade of all nations should enjoy complete freedom, has been re-enacted, and new rules have been laid down, so that the original or acceding parties to the new convention should enjoy the full benefit in practice of that freedom of navigation on the Congo, Niger, and their tributaries which was declared by the General Act.

Side by side with these general treaties, which recognise free navigation on international rivers in Europe and Africa, stand treaties⁵ of several South American States with other States concerning free navigation for merchantmen of all nations on a number of South American rivers. And the Arbitration Court, sitting in

¹ See Treaty of Peace with Germany, Articles 336-337. Complaints under these two articles are to be heard by a tribunal to be instituted for the purpose by the League of Nations.

² See Articles 354-362.

³ The membership of this Commission has been varied by Article 355.

⁴ Treaty Ser. No. 18 (1919), Cmd. 477.

⁵ See Taylor, § 238, and Moore, i. § 131, pp. 639-651.

Paris, in the case of the boundary dispute between Great Britain and Venezuela, decided in 1899 in favour of free navigation for merchantmen of all nations on the rivers Amakourou and Barima.¹

Thus the principle of free navigation, which is a settled fact as regards all European and some African international rivers, becomes more and more extended over all other international rivers of the world. But when several writers maintain that free navigation on all international rivers of the world is already a recognised rule of the Law of Nations, they are decidedly wrong, although such a universal rule will certainly be proclaimed in the future. There can be no doubt that as regards the South American rivers the principle is recognised by treaties between a small number of Powers only. And there are examples which show that the principle is not yet universally recognised. Thus by Article 4 of the Treaty of Washington of 1854 between Great Britain and the United States the former grants to vessels of the latter free navigation on the river St. Lawrence as a revocable privilege, and Article 26 of the Treaty of Washington of 1871 stipulates for vessels of the United States, but not for vessels of other nations, free navigation 'for ever' on the same river.²

However this may be, the principle of free navigation involves a provision that vessels of all nations must be admitted without payment of any dues whatever other than dues levied upon all navigating vessels for expenses incurred by the riparian States for such improvements of the navigability of rivers as embankments, breakwaters, and the like, and for maintaining good conditions of navigation.³ This has been expressly recog-

¹ Martens, *N.R.G.*, 2nd Ser. xxix. p. 587.

² See Wharton, i. pp. 81-83; Moore, i. § 131, p. 631; and Hall, § 39.

³ As regards the question of levying dues for navigation of the rivers Rhine and Elbe prior to the Treaties of Peace of 1919, see Arndt in *Z.V.*, iv. (1910), pp. 208-229.

nised in the general provisional régime adopted by the Treaties of Peace.

§ 178*a*. Apart from navigation on rivers, the question of the utilisation of the flow of rivers is of importance.¹ With regard to national rivers, the question cannot indeed be raised, since the local State is absolutely unhindered in the utilisation of the flow. But the flow of not-national, boundary, and international rivers is not within the arbitrary power of one of the riparian States, for it is a rule of International Law² that no State is allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State. For this reason a State is not only forbidden to stop or to divert the flow of a river which runs from its own to a neighbouring State, but likewise to make such use of the water of the river as either causes danger to the neighbouring State or prevents it from making proper use³ of the flow of the river on its part. Since, apart from special treaties between neighbouring countries concerning special cases, there are neither customary nor conventional detailed rules of International Law concerning this subject, the Institute of International Law, at its meeting at Madrid⁴ in 1911, adopted a 'Règlementation internationale des Cours d'eau internationaux au point de vue de leurs Forces motrices et de leur Utilisation industrielle et agricole,' for the consideration of the several States and any such action as they might think fit.

Utilisation of the Flow of Rivers.

The general provisional régime adopted by the

¹ The work of Schulthess, *Das internationale Wasserrecht* (1915), is most valuable on this, as on every other question of International Law concerning territorial waters.

² See above, § 127.

³ See, for instance, the Treaty of Washington of January 11, 1909—Martens, *N.R.G.*, 3rd Ser. iv.,

p. 208—between Great Britain and the United States concerning the utilisation of the boundary waters between the United States and Canada.

⁴ See *Annuaire*, xxiv. (1911), p. 365. See also Bar in *R.G.*, xvii. (1910), pp. 281-288.

Treaties of Peace for international rivers contains—as has already been mentioned (see above § 178)—a provision that no riparian State may undertake any works of a nature to impede navigation in the international section, unless all the riparian States (or all the States represented on the International Commission, if there is one) agree that rights of irrigation, water-power, fisheries, or other national interests should be given priority over the requirements of navigation.¹ But apart from this, and from special stipulations in the treaties dealing with particular cases, no steps have as yet been taken to give effect to the recommendations of the Institute.

IV

LAKES AND LAND-LOCKED SEAS

Vattel, i. § 294—Hall, § 38—Phillimore, i. §§ 205-205a—Twiss, i. § 181—Halleck, i. pp. 181-182—Moore, i. §§ 135-143—Hershey, Nos. 197-198—Bluntschli, § 316—Hartmann, § 58—Heffter, § 76—Caratheodory in *Holtzendorff*, ii. pp. 378-385—Gareis, §§ 20-21—Liszt, § 9—Ullmann, §§ 88 and 106—Bonfils, Nos. 495-505—Despagnet, No. 407—Mérignhac, ii. 587-595—Pradier-Fodéré, ii. Nos. 640-649—Nys, i. pp. 488-491—Calvo, i. §§ 301, 373, 374, 383—Fiore, ii. Nos. 811-813, and *Code*, Nos. 284 and 1005—Martens, i. § 100—Rivier, i. pp. 143-145, 230—Mischeff, *La Mer Noire et les Détroits de Constantinople* (1901)—Schulthess, *Das internationale Wasserrecht* (1915)—Hunt in *A.J.*, iv. (1910), pp. 285-313.

Lakes and
Land-
locked
Seas State
Property
of Ri-
parian
States.

§ 179. Theory and practice agree upon the rule that such lakes and land-locked seas as are entirely enclosed by the land of one and the same State are part of the territory of this State. Thus Lake Windermere is part of British territory, and the Lake of Como is Italian territory. As regards, however, such lakes and land-locked seas as are surrounded by the territories of several States, no unanimity exists. The majority of writers consider these lakes and land-locked seas parts of the

¹ See Treaty of Peace with Germany, Article 337.

surrounding territories, but several¹ dissent, asserting that these lakes and seas do not belong to the riparian States, but are free like the open sea. The practice of the States seems to favour the opinion of the majority of writers, for special treaties frequently arrange what portions of such lakes and seas belong to each of the riparian States.² Examples are: The Lake of Constance,³ which is surrounded by the territories of Germany (Baden, Württemberg, Bavaria), Austria, and Switzerland (Thurgau and St. Gall); the Lake of Geneva, which belongs to Switzerland and France; the Lakes of Huron, Erie, and Ontario, which belong to the British Dominion of Canada and the United States.⁴

§ 180. In analogy with so-called international rivers, such lakes and land-locked seas as are surrounded by the territories of several States and are at the same time navigable from the open sea, are called 'international lakes and land-locked seas.' However, although some writers⁵ dissent, it must be emphasised that hitherto the Law of Nations has not recognised the principle of free navigation on such lakes and seas. The only case in which such free navigation is stipulated is that of the lakes within the Congo district.⁶ But

So-called
Inter-
national
Lakes and
Land-
locked
Seas.

¹ See, for instance, Calvo, i. § 301; Caratheodory in *Holtzendorff*, ii. p. 378.

² As regards the utilisation of the flow of such lakes and seas, the same is valid as that concerning the utilisation of the flow of rivers. See above, § 178a.

³ See Stoffel, *Die Fischerei-Verhältnisse des Bodensees unter besonderer Berücksichtigung der an ihm bestehenden Hoheitsrechte* (1906).

⁴ As regards jurisdiction, fisheries, and navigation on the Canadian-American lakes, see Moore, i. §§ 136-143, and Callahan, *The Neutrality of the American Lakes and Anglo-American Relations* (1898). It would be wrong to consider these lakes neutralised, because the agreement

made by an exchange of Notes between Great Britain and the United States on April 28 and 29, 1817, does not stipulate neutralisation, but only limits the number of war-vessels to be kept on the lakes by the two Governments. See Moore, i. § 143.

⁵ See, for instance, Rivier, i. p. 230; Caratheodory in *Holtzendorff*, ii. p. 378; Calvo, i. § 301.

⁶ Article 15 of the General Act of the Congo Conference—see Martens, *N.R.G.*, 2nd Ser. x. p. 417—by which free navigation was originally stipulated, was abrogated by the convention signed at St. Germain on September 10, 1919 (Treaty Ser. No. 18 (1919), Cmd. 477), but the free navigation of these lakes is provided for in the new convention.

there is no doubt that in a near future this principle will be recognised, and practically all so-called international lakes and land-locked seas are actually open to merchantmen of all nations. Good examples of such international lakes and land-locked seas are the above-named Lakes of Huron, Erie, and Ontario.

The Cas-
pian Sea
and the
Black
Sea.

§ 181. It is of interest to give a few details as to the position of the Caspian Sea and the Black Sea before the World War.

The Caspian Sea, which was surrounded by Russian and Persian territory, belonged in part to Russia and in part to Persia, and navigation was regulated by Article 5 of the Russo-Persian Treaty of Gulistan¹ of October 12, 1813, and by Article 8 of the Russo-Persian Treaty of Tourkmantschai² of February 22, 1828. By these stipulations a distinction was drawn between merchantmen and vessels of war. Navigation was open to the merchantmen of both Powers; Russian vessels were admitted to *cabotage* (see below, § 579) on the Persian coasts and Persian vessels on the Russian coasts. But Russia alone had the right to maintain vessels of war on the Caspian Sea.

The Black Sea was a land-locked sea which was undoubtedly wholly a part of Turkish territory as long as the enclosing land was all Turkish, and as long as the Bosphorus and the Dardanelles, the approach to the Black Sea, which were exclusively part of Turkish territory, were not open for merchantmen of all nations. But matters changed when Russia, Roumania, and Bulgaria became littoral States. It was wrong to maintain that the Black Sea then became part of the territories of the four States, for the Bosphorus and the Dardanelles, although belonging to Turkish territory, werè nevertheless parts of the Mediterranean Sea, and were open to merchant-

¹ See Martens, *N.R.*, iv. p. 89.

² See Martens, *N.R.*, vii. (ii.) p. 564.

men of all nations. The Black Sea consequently became part of the open sea¹ and was not the property of any State. Article 11 of the Peace Treaty of Paris,² 1856, neutralised the Black Sea, and declared it open to merchantmen of all nations, but interdicted it to men-of-war of the littoral as well as of other States, admitting only a few Turkish and Russian public vessels for the service of their coasts. But although the neutralisation was stipulated 'formally and in perpetuity,' it lasted only till 1870. In that year, during the Franco-German War, Russia shook off the restrictions of the Treaty of Paris, and the Powers assembled at the Conference of London signed, on March 13, 1871, the Treaty of London,³ by which the neutralisation of the Black Sea and the exclusion of men-of-war therefrom were abolished. But the right of the Porte to forbid foreign men-of-war passage through the Dardanelles and the Bosphorus⁴ was upheld by that treaty, as was also free navigation for merchantmen of all nations on the Black Sea.

Owing to the uncertain situation in the Middle East, and in particular the position in Russia, it is not at present possible to make any statement as to the status of the Caspian and Black Seas since the conclusion of the World War.

V

CANALS

Westlake, i. pp. 338-349—Lawrence, § 90, and *Essays*, pp. 37-146—Phillimore, i. §§ 99a and 207—Moore, iii. §§ 336-371—Hershey, No. 201—Caratheodory in *Holtzendorff*, ii. pp. 386-405—Liszt, § 27—Ullmann, § 106—Bonfils, Nos. 511-515—Despagnet, No. 418—Mérignhac, ii. pp. 597-605—Pradier-Fodéré, ii. Nos. 658-660—Nys, i. pp. 516-539—Rivier, i. § 16—Calvo, i. §§ 376-380—Fiore, *Code*, Nos. 988-992—Martens, ii.

¹ See below, § 252.

³ See Martens, *N.R.G.*, xviii. p. 303.

² See Martens, *N.R.G.*, xv. p. 775.

⁴ See below, § 197.

§ 59—Sir Travers Twiss in *R.I.*, vii. (1875), p. 682, xiv. (1882), p. 572, xvii. (1885), p. 615—Holland, *Studies*, pp. 270-293—Asser in *R.I.*, xx. (1888), p. 529—Bustamante in *R.I.*, xxvii. (1895), p. 112—Rossignol, *Le Canal de Suez* (1898)—Camand, *Étude sur le Régime juridique du Canal de Suez* (1899)—Charles-Roux, *L'Isthme et le Canal de Suez* (1901)—Othalom, *Der Suezkanal* (1905)—Müller-Heymer, *Der Panamakanal in der Politik der Vereinigten Staaten* (1909)—Arias, *The Panama Canal* (1911)—Catellani, *Il Canale di Panama* (1913)—Bunsau-Varilla, *Panama* (1913)—Dedreux, *Der Suezkanal im internationalen Rechte* (1913)—Georgi Dufour, *Urkunden zur Geschichte des Suezkanals* (1913)—Laun, *Die Internationalisierung der Meerengen und Kanäle* (1918)—Hains, Davis, Knapp, Olney, Wambaugh, and Kennedy in *A.J.*, iii. (1909), pp. 354 and 885, iv. (1910), p. 314, v. (1911), pp. 298, 615, 620—Lehmann in *Z.I.*, xxiii. (1913), pp. 46-102—Baty in *Jahrbuch des Völkerrechts*, i. (1913), pp. 453-480—Diena in *Z.I.*, xxv. (1915), pp. 14-22.

Canals
State Pro-
perty of
Riparian
States.

§ 182. That canals are parts of the territories of the respective territorial States is obvious from the fact that they are artificially constructed waterways. And there ought to be no doubt¹ that all the rules regarding rivers must analogously be applied to canals. The matter would need no special mention at all were it not for the interoceanic canals which were constructed during the second half of the nineteenth century or are contemplated in the future. As regards one of these, the Corinth Canal, which connects the Gulf of Corinth with the Gulf of Ægina, there is not much to be said. It is entirely within the territory of Greece, and although the canal is kept open for navigation to vessels of all nations, Greece exclusively controls the navigation thereof.

The Suez
Canal.

§ 183. The most important of the interoceanic canals is that of Suez, which connects the Red Sea with the Mediterranean. Already in 1838 Prince Metternich gave his opinion that such a canal, if ever made, ought to become neutralised by an international treaty of the Powers, and as early as 1856, before the commencement of the building of the canal, Lesseps made proposals for

¹ See, however, Holland, *Studies*, p. 278.

its neutralisation. When, in 1869, the Suez Canal was opened, jurists and diplomatists at once discussed what means could be found to secure free navigation upon it for vessels of all kinds and all nations in time of peace as well as of war. In 1875 Sir Travers Twiss¹ again proposed the neutralisation of the canal, and in 1879 the Institute of International Law gave its vote² in favour of the protection of free navigation on the canal by an international treaty. In 1883 Great Britain proposed an international conference to the Powers for the purpose of neutralising it, but it took several years before an agreement was achieved. This was done by the Convention of Constantinople³ of October 29, 1888, between Great Britain, Austria-Hungary, France, Germany, Holland, Italy, Spain, Russia, and Turkey. This treaty comprises seventeen articles, the more important stipulations of which are the following :

(1) The canal is open in time of peace as well as of war to merchantmen and men-of-war of all nations. No attempt to restrict this free use of the canal is allowed in time either of peace or of war. The canal can never be blockaded (Article 1).

(2) In time of war, even if Turkey is a belligerent, no act of hostility is allowed either inside the canal itself

¹ See *R.I.*, vii. pp. 682-694.

² See *Annuaire*, iii. and iv., vol. i. p. 349.

³ See Martens, *N.R.G.*, 2nd Ser. xv. p. 557. It must, however, be mentioned that Great Britain became a party to the Convention of Constantinople under the reservation that its terms should not be brought into operation in so far as they were not compatible with the transitory and exceptional condition in which Egypt was put for the time being in consequence of her occupation by British forces, and in so far as they might fetter the liberty of action of the British Government during the occupation of Egypt. But Article 6 of the Declaration

respecting Egypt and Morocco signed at London on April 8, 1904, by Great Britain and France (see *Parl. Papers*, France, No. 1 (1904), p. 9), did away with this reservation, since it stipulated that: 'In order to ensure the free passage of the Suez Canal, His Britannic Majesty's Government declare that they adhere to the stipulations of the Treaty of October 29, 1888, and that they agree to their being put in force. The free passage of the canal being thus guaranteed, the execution of the last sentence of paragraph 1 as well as of paragraph 2 of Article 8 of that Treaty will remain in abeyance.' (See Holland, *Studies*, p. 293, and Westlake, i. p. 345.)

or within three sea miles from its ports.¹ Men-of-war of the belligerents have to pass through the canal without delay. They may not stay longer than twenty-four hours, a case of absolute necessity excepted, within the harbours of Port Said and Suez, and twenty-four hours must intervene between the departure from those harbours of a belligerent man-of-war and a vessel of the enemy. Troops, munitions, and other war material may neither be shipped nor unshipped within the canal and its harbours. All rules regarding belligerents' men-of-war are likewise valid for their prizes (Articles 4, 5, 6).

(3) No men-of-war are allowed to be stationed inside the canal, but each Power may station two men-of-war in the harbours of Port Said and Suez. Belligerents, however, are not allowed to station men-of-war in these harbours (Article 7). No permanent fortifications are allowed in the canal (Article 2).

(4) The signatory Powers are obliged to notify the treaty to others and to invite them to accede thereto (Article 16).

On December 18, 1914, Great Britain proclaimed a protectorate over Egypt, and by the Treaties of Peace Germany² and Austria³ have consented, and Turkey will consent, to the transfer to the British Government of the powers conferred by the Suez Canal Convention upon the Sultan.

¹ In 1914, during the World War, the question arose whether, since no hostilities might be committed either inside the Suez Canal or within three miles of its ports, enemy merchantmen were entitled to regard the harbours of the Canal as neutral ports, offering them an asylum for the whole war. A number of German merchantmen, which were at Port Said and Suez at the outbreak of the war, refused to leave the canal in spite of the offer of a free pass. Since they declined to leave, they were taken outside the limits of the ports of the canal, and outside territorial waters,

and were then captured on the high seas by British cruisers. The British Prize Court in Egypt condemned them, and the Privy Council confirmed the condemnation. See *The Pindos*, *Helgoland*, and *Rostock* (1 B. and C.P.C. 248, 2 B. and C.P.C. 146); *The Gutenfels*, *Bärenfels*, and *Derfflinger* (1 B. and C.P.C. 102, 122, 2 B. and C.P.C. 36); *H.M. Procurator v. Deutsches Kohlen Depot* (2 B. and C.P.C. 439, 3 B. and C.P.C. 265); *The Sudmark* (No. 2) (2 B. and C.P.C. 473).

² Article 152.

³ Article 107.

§ 183a. The Kiel Canal, which connects the Baltic with the North Sea, was constructed by Germany, mainly for strategic purposes. It runs wholly through German territory, and before the World War, although Germany in fact kept it open to vessels of other nations, she controlled navigation, and could at any time have closed it to them, apart from any special treaty relations. But by Articles 380-386 of the Treaty of Peace with Germany, it is provided that the canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality, and that only such charges shall be levied as are intended to cover in an equitable manner the cost of maintaining or improving the conditions of navigation. Germany is bound to ensure that good conditions are maintained, to remove any obstacle or danger to navigation, and to refrain from works of a nature to impede it. The League of Nations is to institute a 'jurisdiction' to hear disputes as to the interpretation of these articles, and complaints of their violation; but small questions are to be determined in the first instance by a local authority at Kiel.

§ 184. Already in 1850 Great Britain and the United States, in the Clayton-Bulwer Treaty¹ of Washington, had stipulated the free navigation and neutralisation of a canal between the Pacific and the Atlantic Ocean proposed to be constructed by the way of the river St. Juan de Nicaragua and either or both of the lakes of Nicaragua and Managua. In 1881 the building of a canal through the Isthmus of Panama was taken in hand, but in 1888 the works were stopped in consequence of the financial collapse of the company under-

¹ See Martens, *N.R.G.*, xv. p. 187, and Moore, iii. §§ 351-365. According to its Article 8 this treaty

was also to be applied to a proposed canal through the Isthmus of Panama.

taking its construction. After this the United States came back to the old project of a canal by the way of the river St. Juan de Nicaragua. For the eventuality of the completion of this canal, Great Britain and the United States signed, on February 5, 1900, the Convention of Washington, which stipulated free navigation on, and neutralisation of, the proposed canal in analogy with the Convention of Constantinople, 1888, regarding the Suez Canal. This convention was not ratified, because the Senate made amendments which Great Britain could not accept.

In the following year, however, on November 18, 1901, another treaty was signed and afterwards ratified. This so-called Hay-Pauncefote Treaty¹ applies to a canal between the Atlantic and Pacific Oceans, by whatever route may be considered expedient, and supersedes the Clayton-Bulwer Treaty. Under it the United States has the exclusive right of providing for the regulation and management of the canal, and a number of rules, substantially as embodied in the Suez Canal Convention, are adopted 'as the basis of the neutralisation' of the canal. It is to be free and open to the vessels of commerce and of war of all nations observing these rules on terms of entire equality;² it is never to be blockaded, nor shall any right of war be exercised

¹ See Moore, iii. §§ 366-368.

² This provision that the canal is to be free and open to the vessels of all nations 'on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise,' was held by the British Government to be violated by the fifth section of the Panama Canal Act of August 24, 1912, which gave preferential treatment to the vessels of the United States. Thus arose the lengthy 'Panama Canal Conflict,' which was amicably settled through

the passage of new legislation in 1914. The literature upon it was very voluminous. See *Parl. Papers*, Misc., No. 12 (1912), Cd. 6451; Oppenheim, *The Panama Canal Conflict* (2nd. ed. 1913); Richards, *The Panama Canal Controversy* (1913); Root, *The Obligations of the United States as to Panama Canal Tolls* (1913); and articles in the *Law Magazine and Review*, xxxviii. (1912-1913), *A.J.*, vi. (1912), and vii. (1913), *R.I.*, 2nd Ser. xiv. (1912), *Z.V.*, vi. (1913), *Z.I.*, xxiii. (1913), *Jahrbuch für Völkerrecht*, i. (1913), and the *Proceedings of the American Society of International Law*, vii. (1913).

or any act of hostility be committed within it. The United States is, however, at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.¹ The transit of belligerent vessels and prizes through the canal is to be effected with the least possible delay, and they may not revictual, or take any stores, except so far as may be strictly necessary. No belligerent is to embark or disembark troops or munitions of war in the canal, or in the waters within three marine miles of either end of it. A belligerent war vessel may not remain in such waters for more than twenty-four hours at any one time, except in distress, and may not depart within twenty-four hours from the departure of a war vessel of the other belligerent. All works necessary to the construction, operation, and maintenance of the canal are to enjoy immunity from attack and injury in time of war as in time of peace.

On November 18, 1903, the so-called Hay-Varilla Treaty² was concluded between the United States and the new Republic of Panama, according to which, on the one hand, the United States guarantees and will maintain the independence of the Republic of Panama, and, on the other hand, the Republic of Panama grants³ to the United States in perpetuity for the construction, administration, and protection of a canal between Colon and Panama the use, occupation, and control of a strip of land required for the construction of the canal, and, further, of land on both sides of the canal to the extent of five miles on either side, with the exclusion, however, of the cities of Panama and Colon and the harbours

¹ The question whether the United States had a right to fortify the Panama Canal was much discussed before the World War. See Hains and Davis in *A.J.*, iii. (1909), pp. 354-394 and pp. 885-908, and Olney, Wambaugh, and Kennedy in *A.J.*,

v. (1911), pp. 298, 615, 620.

² See Martens, *N.R.G.*, 2nd Ser. xxxi. p. 599.

³ That this grant is really cession all but in name, was pointed out above, § 171 (4); see also below, § 216.

adjacent to these cities. According to Article 18 of this treaty the canal and the entrance thereto shall be neutral in perpetuity, and shall be open to vessels of all nations as stipulated by Article 3 of the Hay-Pauncefote Treaty.

The Panama Canal was opened in 1914,¹ and rules for its operation and navigation were issued by the United States. After the outbreak of the World War, on November 13, 1914, a proclamation was issued prescribing rules for its use by belligerent vessels,² and when the United States had entered the war a further proclamation was issued on May 23, 1917.³

VI

MARITIME BELT

Grotius, ii. c. 3, §§ 9-12—Vattel, i. §§ 287-290—Hall, §§ 41-42—Westlake, i. pp. 187-196—Lawrence, § 87—Phillimore, i. §§ 197-201—Twiss, i. §§ 144, 190-192—Halleck, i. pp. 167-179—Taylor, §§ 247-250—Walker, § 17—Wharton, i. § 32—Moore, i. § 144-152—Wheaton, §§ 177-180—Hershey, Nos. 191-194—Bluntschli, §§ 302, 309-310—Hartmann, § 58—Heffter, § 75—Stoerk in *Holtzendorff*, ii. pp. 409-453—Gareis, § 21—Liszt, § 9—Ullmann, § 87—Bonfils, Nos. 491-494—Despagnet, Nos. 403-414—Mérignhac, ii. pp. 370-392—Pradier-Fodéré, ii. Nos. 617-639—Nys, i. pp. 540-569—Rivier, i. pp. 145-153—Calvo, i. §§ 353-365—Fiore, ii. Nos. 801-807, and *Code*, Nos. 267-271, 276-278, 1030—Martens, i. § 99—Bynkershoek, *De Dominio Maris* and *Quaestiones Juris publici*, i. c. 8—Ortolan, *Diplomatie de la Mer* (1856), i. pp. 150-175—Heilborn, *System*, pp. 37-57—Imbart-Latour, *La Mer territoriale*, etc. (1889)—Godey, *La Mer côtière* (1896)—Shücking, *Das Küstenmeer im internationalen Rechte* (1897)—Perels, § 5—Fulton, *The Sovereignty of the*

¹ By a treaty between the United States and Nicaragua, signed at Washington on August 5, 1914, and ratified on June 22, 1916, Nicaragua granted to the United States, in return for a sum of \$3,000,000, the exclusive right to construct and manage an inter-oceanic canal through Nicaragua. (See *A.J.*, x. (1916), Supplement, p. 258.) It does not seem that the

United States Government has any present intention of building another canal, but merely desires to hold an option over the only other available routes to prevent any possibility of competition with the Panama Canal. (See Finch in *A.J.*, x. (1916), pp. 344-351.)

² *A.J.*, ix. (1915), pp. 167-175.

³ *A.J.*, xi. (1917), pp. 165-168.

Sea (1911), pp. 537-603—Raestad, *La Mer territoriale* (1913), and in *R.G.*, xix. (1912), pp. 598-623, xxi. (1914), pp. 401-420—Schramm, *Das Priisenrecht* (1913), pp. 66-74—Barclay in *Annuaire*, xii. (1892), pp. 104-136, and xiii. (1894), pp. 125-162—Martens in *R.G.*, i. (1894), pp. 32-43—Aubert, *ibid.* pp. 429-441—Engelhardt in *R.I.*, xxvi. (1894), pp. 209-213—Godey in *R.G.*, iii. (1896), pp. 224-237—Lapradelle in *R.G.*, v. (1898), pp. 264-284, 309-347—Balch in the *Proceedings of the American Society of International Law*, vi. (1912), pp. 132-141—Barclay and Charteris in *Reports of the International Law Association*, vol. xxvii. (1912), pp. 81-127—Kraemer in *Z.V.*, vii. (1913), pp. 123-152—Salmond in the *Law Quarterly Review*, xxxiv. (1918), pp. 235-252.

§ 185. Maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the littoral States. But no unanimity exists with regard to the nature of the sway of the littoral States. Many writers maintain that such sway is sovereignty, that the maritime belt is a part of the territory of the littoral State, and that the territorial supremacy of the latter extends over its coast waters. Whereas it is nowadays universally recognised that the open sea cannot be State property, such part of the sea as makes the coast waters would, according to the opinion of these writers, actually be the State property of the littoral States, although foreign States have a right of innocent passage for their merchantmen through the coast waters.

State Property of Maritime Belt contested.

On the other hand, many writers¹ of great authority emphatically deny the territorial character of the maritime belt, and concede to the littoral States, in the interest of the safety of the coast, only certain powers of control, jurisdiction, police, and the like, but not sovereignty.

This is surely erroneous, since the real facts of international life would seem to agree with the first-mentioned opinion only. Its supporters rightly maintain² that the universally recognised fact of the exclusive

¹ Their arguments are very ably stated by Lapradelle in *R.G.*, v. (1898), pp. 273-284 and 309-330.

treated with great clearness by Heilborn, *System*, pp. 36-58, and Shücking, *op. cit.*, pp. 14-20.

² Hall, p. 155. The question is

right of the littoral State to appropriate the natural products of the sea in the coast waters, especially the use of the fishery therein, can coincide only with the territorial character of the maritime belt. The argument of their opponents that, if the belt is to be considered a part of State territory, every littoral State must have the right to cede and exchange its coast waters, can properly be met by the statement that territorial waters of all kinds are inalienable appurtenances¹ of the littoral and riparian States.²

Breadth
of Mari-
time Belt.

§ 186. Be that as it may, the question arises how far into the sea those waters extend which are coast waters, and are therefore under the sway of the littoral State. Here, too, no unanimity exists as to the breadth of the belt or the point on the coast from which it is measured.

(1) Whereas the starting line is sometimes drawn along high-water mark, many writers draw it along low-water mark. Others draw it along the depths where the waters cease to be navigable; others again along those depths where coast batteries can still be erected, and so on.³ But the number of those who draw it along low-water mark is increasing. The Institute of International Law⁴ has voted in favour of this starting line, and many treaties stipulate the same.

(2) With regard to the breadth of the maritime belt various opinions have in former times been held, and

¹ See above, §175. Bynkershoek's opinion (*De Dominio Maris*, c. 5) that a littoral State can alienate its maritime belt without the coast itself is at the present day untenable.

² The fact that Article 1 of Convention 13 (Rights and Duties of Neutral Powers in Maritime War) of the second Hague Peace Conference, 1907, speaks of 'sovereign rights . . . in neutral waters' would seem to indicate that the States themselves consider their sway over the maritime belt to be of the nature of

sovereignty. The Privy Council in *A.G. for British Columbia v. A.G. for Canada*, [1914] A.C. 153, at p. 174, declared that the question was not settled.

³ See Shücking, *op. cit.*, p. 13.

⁴ See *Annuaire*, xiii. p. 329. But before the World War the Institute was reconsidering the question. See reports by Barclay in *Annuaire*, xxv. (1912), pp. 375-396, and Oppenheim in *Annuaire*, xxvi. (1913), pp. 403-412.

very exorbitant claims have been advanced by different States, such as a range of sixty or a hundred miles, or a range of vision (about fourteen miles). Although Bynkershoek's rule that *terrae potestas finitur ubi finitur armorum vis* is now generally recognised by theory and practice, and consequently a belt of such breadth is considered under the sway of the littoral State as is within effective range of the shore batteries, there is still no unanimity on account of the fact that such range is day by day increasing. Since at the end of the eighteenth century the range of artillery was about three miles, or one marine league, that distance became generally ¹ recognised as the breadth of the maritime belt. But no sooner was a common doctrine originated than the range of projectiles increased with the manufacture of heavier guns. And although Great Britain, France, Austria, the United States of America, and other States in Municipal Laws and International Treaties still adhere to a breadth of one marine league, there is much agitation in favour of extending it considerably by common agreement.² As regards Great Britain, the Territorial Waters Jurisdiction Act ³ of 1878 (41 & 42 Vict. c. 73) indirectly recognises ⁴ the extent of the terri-

¹ But not universally. Thus Norway claims a breadth of four miles and Spain even a breadth of six miles. As regards Norway, see Aubert in *R.G.*, i. (1894), pp. 429-441. Sweden claimed a breadth of four miles in the case of *The Elida* (*Z.V.*, ix. (1915), p. 109), but the claim was disallowed by the German Prize Court of Appeal. Great Britain refused in 1914, during the World War, to recognise a claim of the Argentine and Uruguay to a belt more than three miles wide. See below, vol. ii. § 71 n., where the extensions claimed by France and Italy are also mentioned.

² The Institute of International Law has voted in favour of six miles, or two marine leagues, as the breadth

of the belt. See *Annuaire*, xiii. p. 286. A good survey of the attitude of all maritime States concerning the width of the maritime belt is given by Raestad in *R.G.*, xxi. (1914), pp. 401-420.

³ See above, § 25, and Maine, p. 39.

⁴ It is frequently asserted—see, for instance, Fulton, *op. cit.*, pp. 591-593—that the Territorial Waters Jurisdiction Act does not recognise the width of the maritime belt in general to be three miles. Since, however, by section 7 the term 'territorial waters of Her Majesty's dominions' means such part of the sea adjacent to the coast . . . as is deemed by International Law to be within the territorial sovereignty of Her Majesty,' and according to the practice of

torial maritime belt as three miles, or one marine league, measured from the low-water mark of the coast.

Fisheries,
Cabotage,
Police,
and Mari-
time Cere-
monials
within the
Belt,

§ 187. Theory and practice agree upon the following principles with regard to fisheries, *cabotage*, police, and maritime ceremonials within the maritime belt :

(1) The littoral State may reserve the fisheries within the maritime belt¹ exclusively for its own subjects, whether fish or pearls or amber or other products of the sea are under consideration.

(2) The littoral State may, in the absence of special treaties to the contrary, exclude foreign vessels from navigation and trade along the coast, the so-called *cabotage*,² and reserve this *cabotage* exclusively for its own vessels. *Cabotage* meant originally navigation and trade along the same stretch of coast between the ports thereof, such coast belonging to the territory of one and the same State. However, the term *cabotage* or coasting trade as used in commercial treaties comprises now³ sea trade between any two ports of the same country, whether on the same coasts or different coasts, provided always that the different coasts are all of them the coasts of one and the same country as a political and geographical unit in contradistinction to the coasts of colonial dependencies of such country.

(3) The littoral State may exclusively exercise police and control within its maritime belt in the interest of its customs duties, the secrecy of its coast fortifications, and the like. Thus foreign vessels can be ordered to take certain routes and to avoid others.

Great Britain there is a rule of International Law which restricts the width of the maritime belt to three miles, the conclusion would seem to be inevitable that the Act indirectly recognises the extent of the maritime belt as three miles. 'Specially' in the last edition of this book was a misprint for 'indirectly.'

¹ Most treaties stipulate for the purpose of fisheries a territorial

maritime belt three miles wide. See, for instance, Article 2 of the Hague Convention concerning Police and Fishery in the North Sea of May 6, 1882. Martens, *N.R.G.*, 2nd Ser. ix. p. 556.

² See Pradier-Fodéré, v. Nos. 2441, 2442.

³ See below, § 579, where the matter is more amply treated.

(4) The littoral State may make laws and regulations regarding maritime ceremonials to be observed by such foreign merchantmen as enter its territorial maritime belt.¹

§ 188. Although the maritime belt is a portion of the territory of the littoral State and therefore under the absolute territorial supremacy of such State, the belt is nevertheless, according to the practice of all the States, open to merchantmen of all nations for inoffensive navigation, *cabotage* excepted. And it is the common conviction² that every State has by customary International Law the *right* to demand that in time of peace its merchantmen may inoffensively pass through the territorial maritime belt of every other State. Such right is correctly said to be a consequence of the freedom of the open sea, for without this right navigation on the open sea by vessels of all nations would in fact be an impossibility. And it is a consequence of this right that no State can levy tolls for the mere passage of foreign vessels through its maritime belt. Although the littoral State may spend a considerable amount of money on the erection and maintenance of lighthouses and other facilities for safe navigation within its maritime belt, it cannot make foreign vessels merely passing pay for such outlays. It is only when foreign ships cast anchor within the belt or enter a port that they can be made to pay dues and tolls by the littoral State. Some writers³ maintain that all nations have the right of inoffensive passage for their merchantmen by usage only, and not by the customary Law of Nations, and that, consequently, in strict law a littoral State may prevent such passage. They are certainly mistaken. An attempt on the part of a littoral State to prevent free navigation through the maritime belt in time of

Navigation
within
the Belt.

¹ See Twiss, i. § 194.

² See above, § 142.

³ Klüber, § 76; Pradier-Fodéré, i. No. 628.

peace would meet with stern opposition on the part of all other States.

But a right for the men-of-war of foreign States to pass unhindered through the maritime belt is not generally recognised. Although many writers assert the existence of such a right, many others emphatically deny it. As a rule, however, in practice no State actually opposes in time of peace the passage of foreign men-of-war and other public vessels through its maritime belt. And it may safely be stated, first, that a usage has grown up by which such passage, if in every way inoffensive and without danger, shall not be denied in time of peace; and, secondly, that it is now a customary rule of International Law that the right of passage through such parts of the maritime belt as form part of the highways for international traffic cannot be denied to foreign men-of-war.¹ However that may be, *passage* must not be confounded with entering a port or roadstead. No State need allow this, although all States do allow² it under certain conditions and with certain exceptions.

Juris-
diction
within the
Belt.

§ 189. That the littoral State has exclusive jurisdiction within the belt as regards mere matters of police and control is universally recognised. Thus it may exclude foreign pilots, may make custom-house arrangements, sanitary regulations, laws concerning stranded vessels and goods, and the like. But it is a moot point³ whether such foreign vessels as do not stay but merely pass through the belt are for the time being under this jurisdiction. It is for this reason that the British Territorial Waters Jurisdiction Act of 1878 (41 & 42 Vict. c. 73), which claims such jurisdiction, has called

¹ See below, § 449.

² All the regulations of the several States concerning visits of foreign men-of-war are printed in *A.J.*, x. (1916), Supplement, pp. 121-178.

³ The Institute of International

Law—see *Annuaire*, xvii. (1898), p. 273—adopted at its meeting at the Hague in 1898 a 'Règlement sur le Régime légal des Navires et de leurs Equipages dans les Ports étrangers,' comprising forty-six rules.

forth protests from many writers.¹ The controversy itself can be decided only by the practice of the States. The British Act quoted, the basis of which is, in my opinion, sound and reasonable, is a powerful factor in initiating such a practice ; but as yet no common practice of the States can be said to exist.

Different from the question of jurisdiction over passing foreign merchantmen is the question of jurisdiction over such vessels when they cast anchor within the maritime belt, or enter a port.² It is agreed that such vessels, and the persons thereon, fall under the jurisdiction of the littoral State in case peace and order outside the ship are disturbed, or persons other than crew or passengers are affected. But many writers maintain, and the practice of France and some other States supports their view, that the littoral State has no jurisdiction in case only the internal order of the ship is affected, or the relations between members of the crew or passengers are alone concerned. However, there is no rule of International Law which limits its jurisdiction to this extent, and it can therefore claim jurisdiction in all matters over such merchantmen, and the persons thereon, as have cast anchor within the maritime belt or entered a port. On the other hand, the littoral State is not compelled to exercise such jurisdiction, and many States have therefore by commercial and consular treaties³ stipulated that in such cases as those in which the internal order of the ship is alone concerned, jurisdiction should be exercised, not by the littoral State, but by

¹ See Perels, pp. 69-77. The Institute of International Law, which at its meeting at Paris in 1894 adopted a body of eleven rules regarding the maritime belt, gulfs, bays, and straits, voted against the jurisdiction of a littoral State over foreign vessels merely passing through the belt. See *Annuaire*, xiii. p. 328.

² See Praag, Nos. 260-270, where details of the practice of the several States are given.

³ See Hall, § 58 ; Moore, ii. § 204-208 ; Stoerk in *Holtzendorff*, ii. pp. 446-453 ; Bonfile, Nos. 625-628 ; Despagnet, Nos. 429-430 ; Nielsen in *A.J.*, xiii. (1919), pp. 5-12. See also the American case of *Wildenhuis*, (1886) 120 U.S. 1.

the home State through its consul. But it should be mentioned that, even where a littoral State claims full jurisdiction over foreign merchantmen in its ports, this jurisdiction is to a certain small extent limited when the vessel has been compelled to enter a port in distress,¹ because the ship must then in a small degree be regarded as extraterritorial.

Zone for
Revenue
and Sani-
tary
Laws.

§ 190. Not to be confounded with the territorial maritime belt is the zone of the open sea over which a littoral State extends the operation of its revenue and sanitary laws. The fact is that Great Britain and the United States, as well as other States, possess revenue and sanitary laws which impose certain duties not only on their own but also on such foreign vessels bound for one of their ports as are approaching, but not yet within their territorial maritime belt.² Twiss and Phillimore agree in stating that in strict law these Municipal Laws have no basis, since every State is by the Law of Nations prevented from extending its jurisdiction over the open sea, and that it is only the Comity of Nations which admits tacitly the operation of such Municipal Laws as long as foreign States do not object, and provided that no measure is taken within the territorial maritime belt of another nation. I doubt not that in time special arrangements will be made as regards this point by a universal international convention. But I believe that, since Municipal Laws of the above kind have been in existence for more than a hundred years and have not been opposed by other States, a customary

¹ See Moore, ii. § 208, and the award in the case of *The Enterprise* in Moore, *Arbitrations*, p. 4349. See also above, § 144 n.

² The matter is treated by Moore, i. § 151; Taylor, § 248; Twiss, i. § 190; Phillimore, i. § 198; Halleck, i. p. 157; Stoerk in *Holtzendorff*, ii. pp. 475-478; Perels, § 5, pp. 25-28; Raestad, *op. cit.*, pp. 118-120,

128-130, 142-143. See also Hall, *Foreign Powers and Jurisdiction*, §§ 108-109, and *Annuaire*, xiii. (1894), p. 135; the British so-called Hovering Acts (9 Geo. II. c. 35, and 24 Geo. III. c. 47) have been repealed, and the present English law on the subject is contained in the Customs Consolidation Act (1876) (39 & 40 Vict. c. 36), §§ 53, 147, 179, 181, 189.

rule of the Law of Nations may be said to exist which allows littoral States in the interest of their revenue and sanitary laws to impose certain duties on such foreign vessels bound for their ports as are approaching, although not yet within, their territorial maritime belt.

§ 190*a*. Since the most important lighthouses are built outside the maritime belt of the littoral States, the question arises whether a State can claim a maritime belt around its lighthouses in the open sea. Sir Charles Russell, in the *Behring Sea Seal Fisheries* case (see below, § 284), answered it affirmatively as follows: ¹ 'I wish to point out that . . . if a lighthouse is built upon a rock, or upon piles driven into the bed of the sea, it becomes, as far as that lighthouse is concerned, part of the territory of the nation which has erected it, and, as part of the territory of the nation which has erected it, it has, incident to it, all the rights that belong to the protection of territory—no more and no less. . . . That point has never been doubted, and if it were, there is ample authority to support it. The right to acquire by the construction of a lighthouse on a rock in mid ocean a territorial right in respect of the space so occupied is undoubted.'

No Maritime Belt around Lighthouses in the Sea.

It is tempting to compare such lighthouses with islands, and argue in favour of a maritime belt around them; but I believe that such an identification is misleading, and that lighthouses must be treated on the same lines as anchored lightships. Just as a State may not claim sovereignty over a maritime belt around an anchored lightship, so it may not make such a claim in the case of a lighthouse in the open sea.²

¹ See Moore, *Arbitrations*, i. pp. 900-901.

² See Westlake, i. pp. 119, 190, who agrees with me.

VII

GULFS AND BAYS

Grotius, ii. c. 3, § 8—Vattel, i. § 291—Hall, § 41—Westlake, i. pp. 187-196—Lawrence, § 72—Phillimore, i. §§ 200-201a—Twiss, i. §§ 181-182—Halleck, i. pp. 170-174—Taylor, §§ 229-231—Walker, § 18—Hershey, No. 195—Wharton, i. §§ 27-28—Moore, i. § 153—Wheaton, §§ 181-189—Bluntschli, §§ 309-310—Hartmann, § 58—Heffter, § 76—Stoerk in *Holtzendorff*, ii. pp. 419-428—Gareis, § 21—Liszt, § 9—Ullmann, § 88—Bonfils, No. 516—Despagnet, Nos. 405-406—Mérignhac, ii. pp. 394-398—Pradier-Fodéré, ii. Nos. 661-681—Nys, i. pp. 477-488—Rivier, i. pp. 153-157—Calvo, i. §§ 366-367—Fiore, ii. Nos. 808-815, and *Code*, Nos. 279-283—Martens, i. § 100—Perels, § 5—Fulton, *The Sovereignty of the Sea* (1911), pp. 586-589 and 717-734—Shücking, *Das Küstenmeer im internationalen Rechte* (1897), pp. 20-24—Barclay in *Annuaire*, xii. pp. 127-129—Charteris in *Reports of the International Law Association*, xxiii. (1907), pp. 103-132, and xxvii. (1912), pp. 107-127—Oppenheim in *Z.V.*, i. (1907), pp. 579-587, and v. (1911), pp. 74-95—Salmond in the *Law Quarterly Review*, xxxiv. (1918), pp. 235-252.

Terri-
torial
Gulfs and
Bays.

§ 191. Such gulfs and bays as are enclosed by the land of one and the same littoral State, and have an entrance from the sea not more than six miles wide, are certainly territorial; those, on the other hand, that have an entrance too wide to be commanded by coast batteries erected on one or both sides of it, even though enclosed by one and the same littoral State, are certainly not territorial. These two propositions may safely be maintained. It is, however, controversial how far bays and gulfs encompassed by a single littoral State, and possessing an entrance more than six miles wide, yet not too wide to be commanded by coast batteries, can be territorial. Some writers¹ state that no such gulf or bay can be territorial, and Lord Fitzmaurice declared in the House of Lords on February 21, 1907, in the

¹ See Walker (§ 18), and Wilson and Tucker (5th ed. 1910, § 53). Westlake (vol. i. p. 191) cannot be cited in favour of it, since he distinguishes between bays and gulfs in such a way as is not generally done by international lawyers, and as is

certainly not recognised by geography; for the very examples which he enumerates as *gulfs* are all called *bays*, namely those of Conception, of Cancale, of Chesapeake, and of Delaware.

name of the British Government, that only bays with an entrance *not* more than six miles wide were to be regarded as territorial. But in the *North Atlantic Coast Fisheries* case, which was decided by the Permanent Court of Arbitration at the Hague in 1910, Great Britain disowned ¹ the declaration by Lord Fitzmaurice. The United States contended for its accuracy, but the Court refused to agree. Other writers maintain that gulfs and bays with an entrance more than ten miles wide, or three and a third marine leagues, cannot belong to the territory of the littoral State, and the practice of several States, such as Germany, Belgium, and Holland, accords with this opinion. But the practice of other countries, approved by many writers, goes beyond this limit. Thus France holds the Bay of Cancale to be territorial, although its entrance is seventeen miles wide, Great Britain holds the Bay of Conception in Newfoundland and the Bays of Chaleurs and Miramichi in Canada to be territorial, although the width between their headlands is twenty, sixteen, and fourteen miles respectively. Even the Hudson Bay in Canada, which embraces about 580,000 square miles, and the entrance of which is fifty miles wide, is claimed as territorial by Great Britain.² Norway claims the Varanger Fiord as territorial, although its entrance is thirty-two miles wide. The United States claims the Chesapeake and Delaware Bays, as well as other inlets of the same character, as territorial,³ although the entrance to the one is twelve miles wide and to the other ten miles. The Institute of International Law has voted in favour of a twelve miles wide entrance, but admits the territorial character of such gulfs and bays with a wider entrance as have

¹ See *Oral Argument*, part i. pp. 270-271.

² But the claim is denied by the United States. See Balch in *R.I.*, 2nd Ser. xiii. (1911), pp. 539-586,

xv. (1913), pp. 153-172, and in *A.J.*, vi. (1912), pp. 409-459, vii. (1913), pp. 546-565.

³ See Taylor, § 229; Wharton, i. §§ 27 and 28; Moore, i. § 153.

been considered territorial for more than one hundred years.¹

As the matter stands, it is doubtful as regards many gulfs and bays whether they are territorial or not. Examples of territorial bays in Europe are: The Zuider Zee, which is Dutch; and the Bay of Stettin, in the Baltic, which is German, as is also the Jade Bay in the North Sea. An international congress is desirable to settle once for all which gulfs and bays are to be considered territorial. And it must be specially observed that it is hardly possible that Great Britain would still, as she formerly did for centuries, claim the territorial character of the so-called King's Chambers,² which include portions of the sea between lines drawn from headland to headland.

Non-territorial Gulfs and Bays.

§ 192. Gulfs and bays surrounded by the land of one and the same littoral State whose entrance is so wide that it cannot be commanded by coast batteries, and, further, as a rule,³ all gulfs and bays enclosed by the land of more than one littoral State, however narrow their entrance may be, are non-territorial.⁴ They are

¹ See *Annuaire*, xiii. p. 329.

² Whereas Hall (§ 41, p. 159) says: 'England would, no doubt, not attempt any longer to assert a right of property over the King's Chambers,' Phillimore (i. § 200) still keeps up this claim, as did the Attorney-General before the Hague Court of Arbitration in the *North Atlantic Coast Fisheries* case (see *Oral Argument*, part ii. p. 1308). The attitude of the British Government in the *Moray Firth* case—see below, p. 345—would seem to demonstrate that this claim is no longer upheld. See also Lawrence, § 87; Westlake, i. p. 192; Grant in the *Law Quarterly Review*, xxxi. (1915), pp. 410-420. Fulton, *op. cit.*, p. 121, gives a facsimile of a chart prepared by Trinity House in 1604, showing the bearings of the King's Chambers.

³ For an exception to the rule, see the next note as to the Gulf of Fonseca.

⁴ This is not uncontested. A few writers—see, for instance, Twiss, i. § 181—assert that narrow gulfs and bays surrounded by the land of two different States are territorial, the central line dividing the territorial portions. However, the majority of publicists do not accept this opinion, and it would seem that the practice of States likewise rejects it, except in the case of such bays as possess the characteristics of a closed sea. Thus, in the case of *San Salvador v. Nicaragua*, the International Court of the Central American Republics (see *A.J.*, xi. (1917), pp. 693, 700-717) decided in 1917 that, taking into consideration its geographical and historical conditions, as well as its situation, extent, and configuration, the Gulf of Fonseca must be regarded as 'an historic bay possessed of the characteristics of a closed sea,' and that it therefore was part of the

parts of the open sea, the marginal belt inside the gulfs and bays excepted. They can never be appropriated; they are in time of peace and war open to vessels of all nations, including men-of-war, and foreign fishing vessels cannot, therefore, be compelled to comply with municipal regulations of the littoral State concerning the mode of fishing.

An illustrative case is that of the fisheries in the Moray Firth. By Article 6 of the Herring Fishery ¹ (Scotland) Act, 1889, beam and otter trawling is prohibited within certain limits of the Scottish coast, and the Moray Firth inside a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire is included in the prohibited area. In 1905, Mortensen, the captain of a Norwegian fishing vessel, but a Danish subject, was prosecuted for an offence against the above-mentioned Article 6, convicted, and fined by the Sheriff Court at Dornoch, although he contended that the incriminating act was committed outside three miles from the coast. He appealed to the High Court of Justiciary, which,² however, confirmed the verdict of the Sheriff Court, correctly asserting that, whether or not the Moray Firth could be considered as a British territorial bay, the Court was bound by a British Act of Parliament, even if such Act violates a rule of International Law. The British Government, while recognising that the Scottish courts were bound by the Act of Parliament concerned, likewise recognised that, the Moray Firth not being a British territorial bay, foreign fishing vessels could not be compelled to comply with an Act of Parliament regulating the mode of fishing in the Moray Firth outside three miles from the coast, and therefore re-

territories of San Salvador, Honduras, and Nicaragua. The decision of this Court has, of course, only force with regard to the three Central American States concerned; but the United States acknowledges the

territorial character of this gulf. The attitude of other States is not known.

¹ 52 & 53 Vict. c. 23.

² *Mortensen v. Peters*, (1906) 14 S.L.T. 227.

mitted Mortensen's fine. To remedy the conflict between Article 6 of the above-mentioned Herring Fishery (Scotland) Act, 1889, and the requirements of International Law, Parliament passed the Trawling in Prohibited Areas Prevention Act,¹ 1909, according to which no prosecution can take place for the exercise of prohibited fishing methods outside the three miles from the coast, but the fish so caught may not be landed or sold in the United Kingdom.²

Naviga-
tion,
Fishery,
and Juris-
diction in
Terri-
torial
Gulfs and
Bays.

§ 193. As regards navigation, fishery, and jurisdiction the majority of publicists contend that the same rules of the Law of Nations are valid as in the case of navigation and fishery within the territorial maritime belt. The right of fishery may, therefore, exclusively be reserved for subjects of the littoral State.³ And navigation, *cabotage* excepted, must be open ⁴ to merchantmen of all nations, though foreign men-of-war need not be admitted, unless the gulfs or bays in question form part of the highways of international traffic.

But the matter is not settled, and a few writers maintain that foreign vessels may be excluded altogether from territorial gulfs and bays, or admitted only on payment of dues, rates, etc. The author agrees with the opinion of the majority.

¹ 9 Edw. VII. c. 8.

² See Oppenheim in *Z.V.*, v. (1911), pp. 74-95.

³ The Hague Convention concerning Police and Fishery in the North Sea, concluded on May 6, 1882, between Great Britain, Belgium, Denmark, France, Germany, and Holland, reserves by its Article 2 the fishery for subjects of the littoral States of such bays as have an entrance from the sea not wider than

ten miles, but reserves likewise a maritime belt of three miles to be measured from the line where the entrance is ten miles wide. Practically the fishery is therefore reserved for subjects of the littoral State within bays with an entrance much wider than ten miles. See Martens, *N.R.G.*, 2nd Ser. ix. p. 556.

⁴ But this is not universally recognised. See, for instance, Hall, § 41 n.; Twiss, i. § 181; Calvo, i. § 367.

VIII

STRAITS

Grotius, ii. c. 3, § 8—Vattel, i. § 292—Hall, § 41—Westlake, i. pp. 197-201—Lawrence, §§ 87-89—Phillimore, i. §§ 180-196—Twiss, i. §§ 183, 184, 189—Halleck, i. pp. 178-179—Taylor, §§ 230-231—Walker, § 17—Wharton, i. §§ 27-29—Wheaton, §§ 181-191—Moore, i. §§ 133-134—Hershey, No. 196—Bluntschli, § 303—Hartmann, § 65—Heffter, § 76—Stoerk in *Holtzendorff*, ii. pp. 419-428—Gareis, § 21—Liszt, §§ 9 and 26—Ullmann, § 88—Bonfils, Nos. 506-511—Despagnet, Nos. 415-417—Pradier-Fodéré, ii. Nos. 650-656—Nys, i. pp. 492-515—Rivier, i. pp. 157-159—Calvo, i. §§ 368-372—Fiore, ii. Nos. 745-754, and *Code*, Nos. 285-287—Martens, i. § 101—Holland, *Studies*, pp. 277-279—Knorr, *Die Donau und die Meerengenfrage* (1917)—Laun, *Die Internationalisierung der Meerengen und Kanäle* (1918)—Salmond in the *Law Quarterly Review*, xxxiv. (1918), pp. 235-252.

§ 194. All straits which are not more than six miles wide are certainly territorial. Therefore, straits of this kind which divide the land of one and the same State belong to the territory of such State. Thus the Solent, which divides the Isle of Wight from England, and the Menai Strait, which divides Anglesey from Wales, are British; the Straits of Messina are Italian; and the Great Belt, which divides the islands of Fyn and Sjaelland, is Danish. On the other hand, if such narrow strait divides the land of two different States, it belongs to the territory of both, and the boundary line runs, in default of a special treaty making another arrangement, through the mid-channel.¹ Thus the Strait of Juan de Fuca, which separates the Canadian island of Vancouver from the territory of the United States, and the Lymoon Pass, the narrow strait which separates the British island of Hong-Kong from the

What
Straits are
Terri-
torial.

¹ See below, § 199. According to Wunderlich, in *Z.I.*, xxiii. (1913), pp. 106-112, Germany, before the World War, claimed the whole of the waters between the coast of German South-West Africa and a

number of British islands, though the distance was nowhere more than six miles. The German claim, which was untenable, disappears with the loss of the colony.

continent, was half British and half Chinese as long as the land opposite Hong-Kong was Chinese territory.

It is, however, controversial whether a strait more than six miles wide, yet narrow enough to be commanded by coast batteries erected on one or both sides of the straits, can be territorial. The majority of publicists, including Hall¹ and Hershey,² assert that it can; but a minority, including Westlake³ and Taylor,⁴ maintain that it cannot.

However this may be, it would seem that claims of States over wider straits than those which can be commanded by guns from coast batteries can no longer be upheld. Thus Great Britain used formerly to claim the Narrow Seas—namely, the St. George's Channel, the Bristol Channel, the Irish Sea, and the North Channel—as territorial; and Phillimore asserts that the exclusive right of Great Britain over these Narrow Seas is uncontested. But it must be emphasised that this right *is* contested, and though it was put forward as recently as 1910, by the Attorney-General, before the Hague Tribunal in the *North Atlantic Coast Fisheries* case, I doubt how far Great Britain would now persist in upholding her former claim.⁵ The Territorial Waters Jurisdiction Act, 1878, does not mention it.

Naviga-
tion,
Fishery,
and Juris-
diction in
Straits.

§ 195. All rules of the Law of Nations concerning navigation, fishery, and jurisdiction within the maritime belt apply likewise to navigation, fishery, and jurisdiction within straits. Foreign merchantmen, therefore, cannot⁶

¹ § 41.

² p. 201.

³ vol. i. p. 197.

⁴ § 230.

⁵ See Phillimore, i. § 189, and above, § 191 (King's Chambers). Concerning the Bristol Channel, Hall (§ 41, p. 159, n. 2) remarks: 'It was apparently decided by the Queen's Bench in *Reg. v. Cunningham* (Bell C.C. 86) that the whole of the Bristol Channel between Somerset and Glamorgan is British territory; possibly, however, the

Court intended to refer only to that portion of the Channel which lies within Steepholm and Flatholm.' See also Westlake, i. p. 192, n. 3.

⁶ The claim advanced by Russia—see Waultrin in *R.G.*, xv. (1908), p. 410—to have a right to exclude foreign merchantmen from the passage through the Kara and the Yugor Straits, was therefore unfounded. As regards the Kara Sea, see below, § 253, n. 2.

be excluded; foreign men-of-war must be admitted to such straits as form part of the highways for international traffic;¹ the right of fishery may exclusively be reserved for subjects of the littoral State; and the latter can exercise jurisdiction over all foreign merchantmen passing through the straits. If the narrow strait divides the land of two different States, jurisdiction and fishery are reserved for each littoral State within the boundary line running through the mid-channel, unless otherwise arranged by treaty.

It must, however, be stated that the rule that foreign merchantmen cannot be excluded from the passage through territorial straits applies only when they connect two parts of the open sea. In case a territorial strait belonging to one and the same State connects a part of the open sea with a territorial gulf or bay, or with a territorial land-locked sea belonging to the same State—as, for instance, the Strait of Kertch² until the World War, and formerly the Bosphorus and the Dardanelles³—foreign vessels can be excluded therefrom.

§ 196. The rule that foreign merchantmen must be allowed inoffensive passage through territorial straits without any dues and tolls whatever, had one exception until the year 1857. From time immemorial, Denmark had not allowed foreign vessels the passage through the two Belts and the Sound, a narrow strait which divides Denmark from Sweden and connects the Kattegat with the Baltic, without payment of a toll, the so-called Sound Dues.⁴ Whereas in former cen-

The former Sound Dues.

¹ As, for instance, the Straits of Magellan. These straits were neutralised in 1881—see below, § 568, and vol. ii. § 72—by a treaty between Chili and Argentina. See Abribat, *Le Déroit de Magellan au Point de Vue international* (1902); Nys, i. pp. 511-515, and Moore, i. § 134.

² See below, § 252. Owing to the

situation in Russia, it is impossible to state the present position of this strait.

³ See below, § 197.

⁴ See the details, which have historical interest only, in Twiss, i. § 188; Phillimore, i. § 179; Wharton, i. § 29, and Scherer, *Der Sundzoll* (1845).

turies these dues were not opposed, they were not considered any longer admissible as soon as the principle of free navigation on the sea became generally recognised, but Denmark nevertheless insisted upon the dues. In 1857, however, an arrangement ¹ was completed between the maritime Powers of Europe and Denmark by which the Sound Dues were abolished against a heavy indemnity paid by the signatory States to Denmark. And in the same year the United States entered into a convention ² with Denmark for the free passage of their vessels, and likewise paid an indemnity. With these dues has disappeared the last witness of former times when free navigation on the sea was not universally recognised.

The Bosphorus
and Dardanelles.

§ 197. The Bosphorus and Dardanelles, the two territorial straits which connect the Black Sea with the Mediterranean, must be specially mentioned.³ So long as the Black Sea was entirely enclosed by Turkish territory, and was therefore a portion of this territory, Turkey could exclude ⁴ foreign vessels from the Bosphorus and the Dardanelles altogether, unless prevented by special treaties. But when in the eighteenth century Russia became a littoral State of the Black Sea, and the latter, therefore, ceased to be entirely a territorial sea, Turkey, by several treaties with foreign Powers, conceded free navigation through the Bosphorus and the Dardanelles to foreign merchantmen. But she always upheld the rule that foreign men-of-war should be excluded from these straits; and by Article 1 of the Convention of London of July 13, 1841, between Turkey, Great Britain, Austria,

¹ The Treaty of Copenhagen of March 14, 1857. See Martens, *N.R.G.*, xvi. part ii. p. 345.

² Convention of Washington of April 11, 1857. See Martens, *N.R.G.*, xvii. part i. p. 210.

³ See Holland, *The European Concert in the Eastern Question*

(1885), pp. 224-226; Perels, p. 29; Goriainon, *Le Bosphore et les Dardanelles* (1910); Dascorra, *La Question du Bosphore et des Dardanelles* (1915); Phillipson and Buxton, *The Question of the Bosphorus and the Dardanelles* (1919).

⁴ See above, § 195.

France, Prussia, and Russia, this rule was definitely accepted. Article 10 of the Peace Treaty of Paris of 1856 and the Convention No. 1 annexed to this treaty, and, further, Article 2 of the Treaty of London, 1871, again confirmed the rule, and all those Powers which were not parties to these treaties nevertheless submitted to it.¹ According to the Treaty of London of 1871, however, the Porte could open the straits in time of peace to the men-of-war of friendly and allied Powers for the purpose, if necessary, of securing the execution of the stipulations of the Peace Treaty of Paris of 1856.

On the whole, the rule was in practice upheld by Turkey. Foreign light public vessels in the service of foreign diplomatic envoys at Constantinople could be admitted by the provisions of the Peace Treaty of Paris of 1856; and on several occasions when Turkey admitted a foreign man-of-war carrying a foreign monarch on a visit to Constantinople, there was no opposition by the Powers.² But there were cases when foreign warships passed the straits in violation of the rule. For instance, in 1847, Turkey permitted two French men-of-war to pass the straits for the purpose of towing some corn vessels from the Black Sea to France; the Powers protested, although Turkey had given permission on humanitarian grounds alone. Again, in 1858, the United States Government, which had obtained permission to send a light war vessel for the service of the American Legation at Constantinople, sent the *Wabash*, a large frigate armed with fifty guns; the other Powers protested, whereupon the *Wabash* departed. Further, in 1902, Turkey allowed four Russian torpedo destroyers to pass through the straits

¹ The United States, although she actually acquiesced in the exclusion of her men-of-war, seemed not to consider herself bound by the Convention of London, to which she was not a party. See Wharton, i. § 29,

pp. 79 and 80, and Moore, i. § 134, pp. 666-668. See also Roxburgh, *International Conventions and Third States* (1917), p. 29.

² See Perels, p. 30.

on condition that these vessels should be disarmed and sail under the Russian commercial flag; and Great Britain protested. When, in 1904, during the Russo-Japanese War, *Peterburg* and *Smolensk*, two vessels belonging to the Russian volunteer fleet in the Black Sea, were allowed to pass through to the Mediterranean, no protest was raised, because it was impossible to assume that these vessels, which were flying the Russian commercial flag, would later on convert themselves into men-of-war by hoisting the Russian war flag.¹

But now the straits are about to be opened to men-of-war as well as merchantmen of all nations, both in peace and war. The Treaty of Peace with Turkey is to establish for the zone of the straits a régime resembling the Suez Canal régime,² and to set up an International Commission of Control.

IX

THE AIR AND AERIAL NAVIGATION

Holtzendorff, ii. p. 230—Lawrence, § 73—Bonfils, Nos. 531²-531³—Despagnet, Nos. 433 *bis* and 433 *ter*—Mérignhac, ii. pp. 398-410—Nys, i. pp. 568-587—Grünwald, *Das Luftschiff*, etc. (1908)—Meili, *Das Luftschiff*, etc. (1908)—Meurer, *Luftschiffahrtsrecht* (1909)—Meyer, *Die Erschliessung des Luftraums in ihren rechtlichen Folgen* (1909)—Magnani, *Il Diritto sullo Spazio aereo e l'Aeronautica* (1909)—Leech, *The Jurisprudence of the Air* (1910), a reprint from the *Journal of the Royal Artillery*, vol. xxxvii.—Lycklama à Nijeholt, *Air Sovereignty* (1910)—Hazeltine, *The Law of the Air* (1911)—Bielenberg, *Die Freiheit des Luftraums* (1911)—Catellani, *Il Diritto aereo* (1911) (French translation published in Paris (1912))—Sperl, *Die Luftschiffahrt*, etc. (1911)—Loubeyre, *Les Principes du Droit aérien* (1911)—Thibaut, *Le Domaine aérien des États en Temps de Paix* (1911)—D'Hooghe, *Droit aérien* (1912)—Bellenger, *La Guerre aérienne et le Droit international* (1912)—Richards, *Sovereignty over the Air* (1912)—Reports of the Civil Aerial Transport Committee (1918), Cd. 9218—Spaight, *Aircraft in Peace and the Law* (1919)—Fauchille in *Annuaire*, xix. (1902), pp. 19-114, xxiv. (1911), pp. 23-126, and in *R.G.*, viii. (1901), pp. 414-485, xvii. (1910), pp. 55-62—Zitelmann in the *Zeitschrift für internationale*

¹ See below, vol. ii. § 84. During the World War Turkey, before she became a belligerent, permitted two German cruisers, *Goeben* and the

Breslau, to pass through the straits to Constantinople.

² See above, § 183.

privat- und öffentliches Recht, xix. (1909), pp. 458-496—Baldwin and Kuhm in *A.J.*, iv. (1910), pp. 95-108, 109-132—Baldwin in *Z.V.*, v. (1911), pp. 394-399—Sperl in *R.G.*, xviii. (1911), pp. 473-491—Hershey in *A.J.*, vi. (1912), pp. 381-388—Staël-Holskin in *La Vie internationale*, ii. (1912), pp. 343-370—Lee in *A.J.*, vii. (1913), pp. 470-496.

§ 197*a*. The rapid development of aerial navigation, a few years before the World War, introduced many new problems for international jurists. In particular, it became for the first time important to determine whether the relationship between the maritime belt and the open sea should have a counterpart in the space of the atmosphere, (a distinction being thus drawn between a zone of a certain height in which the territorial State could exercise sovereignty, and the atmosphere beyond that height which was to be considered free like the open sea), or whether the territorial State was to be regarded as exercising sovereignty over the atmosphere to an unbounded height. If the latter alternative was to be accepted, a further question arose whether the territorial State was to have power to prevent altogether the passage of foreign aircraft, or merely to enact rules with which they would have to comply.

Questions
raised by
Aerial
Navigation
before the
World
War.

The author of this book thought that it would probably be best for the States in conference to recognise the sovereignty of the territorial State over the whole space of atmosphere above it to an unlimited height, but to adopt rules giving to foreign States the right to demand that their private (but not public!) aircraft should be allowed to pass through it, provided that they complied with the regulations.

An international conference had assembled at Paris in 1910 to make rules for aerial navigation; but it was without result. The Institute of International Law took up the question, and at its meeting at Madrid in 1911 adopted some suggested rules.¹ For regulating air traffic over the United Kingdom and its territorial waters,

¹ See *Annuaire*, xxiv. (1911), p. 346.

an Aerial Navigation Act was passed in 1911,¹ and amended in 1913.² Under these acts, and the rules made in pursuance of them,³ foreign naval or military aircraft were prohibited from passing over, or landing within, the United Kingdom except on the express invitation, or with the express permission, of the Government. Aircraft of other descriptions coming from abroad had to comply with certain rules as to clearances, cargoes and place of landing. In certain areas flying was entirely prohibited.

Aerial
Navigation
in the
United
Kingdom
from 1914
to the
Present
Time.

§ 197*b*. With the outbreak of the World War aerial navigation for civilians was suspended. But remarkable progress was made in the construction and equipment of aircraft for the forces during the period of hostilities, and very valuable experience was gained of the conditions of navigation; and so it was desirable to prepare new rules to be available at the end of the fighting. Accordingly, a Civil Aerial Transport Committee was appointed by the British Government on May 22, 1917, to consider what steps should be taken 'with a view to the development and regulation after the war of aviation for civil and commercial purposes from a domestic and imperial and an international standpoint.' This Committee made its final report on May 11, 1918.⁴ After the armistices, on February 27, 1919,⁵ a short amending act was passed, and on May 1, 1919, when civilian flying was generally resumed, an elaborate code of rules, made pursuant to the Air Navigation Acts, 1911-1919, came into force.⁶

The Inter-
national
Air Con-
vention.

§ 197*c*. These rules supplied material for the Convention for the Regulation of Aerial Navigation,⁷ which was drawn up at the Peace Conference of 1919, and signed

¹ 1 & 2 Geo. v. c. 4.

² 2 & 3 Geo. v. c. 22.

³ S. R. and O. (1913), Nos. 228 and 243.

⁴ Cd. 9218.

⁵ 9 Geo. v. c. 3.

⁶ See *London Gazette*, April 30, 1919. A new bill, designed to replace the existing Acts and to give effect to the International Air Convention, is now (May 1920) before Parliament.

⁷ Cmd. 670.

on October 13, 1919. The five Principal Allied and Associated Powers, and twenty-two other Allied Powers, were named as parties ; but only fifteen of them signed it, namely, the British Empire, France, Italy, Belgium, Bolivia, Brazil, China, Cuba, Ecuador, Panama, Poland, Portugal, Roumania, Siam, and Uruguay.

The convention applies to peace only, and does not affect the freedom of action of the parties in war, either as belligerents or neutrals (Article 38). Its principal provisions are as follows :

(a) *Sovereignty over the Air*

The parties have agreed, as suggested some years ago by the author, to apply to the space of the atmosphere rules similar to those in existence for the maritime belt. They recognise that every State has complete and exclusive sovereignty over the air space above its territory and territorial waters, but each party undertakes to accord in time of peace freedom of innocent passage to the private aircraft of other parties so long as they comply with the rules made by, or under the authority of, the convention. Any regulations laid down by a party in accordance with the convention as to the admission of such aircraft are to be applied without distinction of nationality.¹ Each contracting State, however, reserves the right to prohibit all private flying over certain areas for military reasons or for public safety.²

(b) *Nationality of Aircraft*

Aircraft must be registered in the State of which their owners are nationals, and in that State alone. Their nationality is that of the State in which they are registered, and they must bear their nationality and registration marks, and the name and residence of their owner, when engaged in international navigation. The

¹ Articles 1-2.

² Article 3.

contracting States are to exchange periodically copies of entries in their registers, and to transmit them to the International Commission for Air Navigation, which is to be constituted under the direction of the League of Nations.¹

(c) *International Navigation by Private Aircraft*

Every private aircraft engaged in international navigation must carry : (1) a certificate of registration ; (2) a certificate of airworthiness from the State to which it belongs ; (3) certificates of competency and licences in respect of each member of the operating crew ; (4) a list of passengers (if any) ; (5) bills of lading and manifest for freight (if any) ; (6) log books ; (7) special licences for wireless equipment and for the wireless operators (if any). Every aircraft used in public transport and capable of carrying ten or more persons must eventually be fitted with wireless apparatus so licensed.² Private aircraft exercising their right of innocent passage across another State without landing must follow the route prescribed by the State flown over, and must land even against their will if ordered to do so. Private aircraft intending to land in another State must land at the aerodromes appointed for the purpose, if the regulations of the State concerned so require. But except for this provision, every aerodrome in a contracting State which upon payment of charges is open to public use by its national aircraft is likewise to be open to the aircraft of all other contracting States. The establishment of international airways is to be subject to the consent of the States flown over.³ *Cabotage*⁴ is reserved for aircraft of the territorial State, Article 16 providing that it shall have the right to reserve to its national aircraft the ' carriage of persons and goods for hire between two points on its

¹ Articles 5-10, Article 34.

² Articles 11-14, Article 19.

³ Article 15, Article 24.

⁴ See below, § 579.

territory.' No private aircraft engaged in international flying is to carry explosives or munitions, under any circumstances, or photographic apparatus except so far as permitted by the State concerned, or any other article the transport of which is forbidden by a State to its own nationals and foreigners alike on grounds of public safety.¹ With regard to aircraft wrecked at sea, the rules applicable to salvage of ships will apply, in the absence of agreement to the contrary;² aircraft of other parties are to enjoy the measures of assistance for landing accorded to national air vessels, particularly in case of distress.³

(d) *Jurisdiction over Private Aircraft*

The authorities of the territorial State have the right to visit every foreign private aircraft, and verify its documents, upon landing and upon departure. Each contracting State undertakes to adopt measures to ensure that every aircraft flying over its territory, and every aircraft bearing its nationality marks, wherever it may be, complies with the rules of navigation formulated by the convention. It also undertakes to ensure the prosecution and punishment of all persons contravening them. An aircraft passing through the territory of a contracting State, or making such landings or stoppages as are reasonably necessary for the purpose of such transit, is not liable to seizure on the ground of infringement of patent, design or model, provided that security is deposited. The amount of the security is to be fixed, in default of amicable agreement, by the competent authority of the State concerned with the least possible delay.⁴

The first draft of the convention had further laid down general rules for jurisdiction over private aircraft;

¹ Articles 26-29.

² See below, § 271; and Article 23.

³ Article 22.

⁴ Articles 21, 25, 18.

but objection was taken to them, and they were deleted. Consequently, all questions of jurisdiction which are not covered by the stipulations just mentioned must be settled by reference to the general principles of International Law. (See above, §§ 123-124, 143-145.)

(e) *State Aircraft*

State aircraft are of two classes: (1) *military*, i.e. those 'commanded by a person in military service detailed for the purpose,' and (2) *non-military*, but exclusively employed in State service, such as posts, customs and police.

(1) *Military* aircraft may not fly over, or land in, the territory of another party without special authorisation; but having obtained such authorisation, they are to enjoy in principle, in the absence of special stipulation, the privileges of extritoriality customarily accorded to foreign war vessels.¹ On the other hand, a military aircraft landing on the territory of another party under any other circumstances can claim no such privileges.

(2) *Non-military*. With regard to police and customs aircraft, the States are to arrange among themselves the conditions upon which they may cross the frontier. Such aircraft are not in any case to enjoy extritoriality. All other non-military State aircraft are to be treated as private aircraft.²

(f) *The International Air Commission*

The convention establishes an International Commission for Air Navigation as a permanent commission under the direction of the League of Nations. Its principal duties are to receive or make proposals for amending the convention, to amend the technical annexes, to carry out duties assigned to it by the conven-

¹ § 450.

² Articles 30-33.

tion, to collect and disseminate information bearing upon air navigation, to publish air maps, and to give an opinion on questions submitted to it for examination.¹

(g) *Amendments to the Convention*

While the International Air Commission can, by the requisite majority, itself amend the annexes, it cannot do more than recommend an amendment of the convention. Every proposed amendment must, however, be considered by it, and cannot be recommended for adoption unless it receives at least two-thirds of all the votes which could be cast if all the States were represented. Even if so carried, it cannot become effective unless formally adopted by the parties to the convention.²

(h) *Disputes*

Disagreements as to the interpretation of the convention are to be referred to the Permanent Court of International Justice,³ and, pending its establishment, to arbitration. But disputes as to a regulation in any of the annexes are to be decided by the International Air Commission, acting by a majority.⁴

(i) *Coming into Force, Accession and Withdrawal*

The convention is to come into force for each signatory State,⁵ in respect of other States which have already ratified, forty days from the deposit of its ratification. States neutral in the World War may accede without restriction; other States only upon the terms of Article 42. Any State may withdraw from it by denunciation, but no such denunciation may be made before January 1, 1922. Denunciation is not to take effect until at least a year after it has been given.⁶

¹ Article 34.

² Article 34.

³ See below, § 476b.

⁴ Article 37.

⁵ The British self-governing Dominions and India are deemed to be States for the purposes of this Convention: Article 40.

⁶ Articles 40-43.

X

BOUNDARIES OF STATE TERRITORY

Grotius, ii. c. 3, §§ 16-18—Vattel, i. § 266—Hall, § 38—Westlake, i. pp. 144-145—Twiss, i. §§ 147-148—Taylor, § 251—Moore, i. §§ 154-162—Hershey, Nos. 162-165—Bluntschli, §§ 296-302—Hartmann, § 59—Heffter, § 66—Holtzendorff in *Holtzendorff*, ii. pp. 232-239—Gareis, § 19—Liszt, § 9—Ullmann, § 91—Bonfils, Nos. 486-489—Despagnet, No. 377—Pradier-Fodéré, ii. Nos. 759-777—Mérignhac, ii. p. 358—Nys, i. pp. 446-472—Rivier, i. § 11—Calvo, i. § 342—Fiore, ii. Nos. 799-806, and *Code*, Nos. 1045-1054—Martens, i. § 89—Lord Curzon of Kedleston, *Frontiers* (Romanes lecture of 1907)—Holdich, *Political Frontiers and Boundary Making* (1915)—Schulthess, *Das internationale Wasserrecht* (1915)—Fawcett, *Frontiers* (1918).

Natural
and Arti-
ficial
Boun-
daries.

§ 198. Boundaries of State territory are the imaginary lines on the surface of the earth which separate the territory of one State from that of another, or from unappropriated territory, or from the open sea. The course of the boundary lines may or may not be indicated by boundary signs. These signs may be natural or artificial, and one speaks, therefore, of natural in contradistinction to artificial boundaries. *Natural* boundaries may consist of water, a range of rocks or mountains, deserts, forests, and the like. *Artificial* boundaries are such signs as have been purposely put up to indicate the way of the imaginary boundary line. They may consist of posts, stones, bars, walls,¹ trenches, roads, canals, buoys in water, and the like. It must, however, be borne in mind that the distinction between artificial and natural boundaries is not sharp, in so far as some natural boundaries can be artificially created. Thus a forest may be planted, and a desert may be created, as was the frequent practice of the Romans of antiquity, for the purpose of marking the frontier.²

¹ The Romans of antiquity very often constructed boundary walls, and the Chinese Wall may also be cited as an example.

² The usual practice adopted by the Peace Conference in 1919 with regard to boundaries was to specify them in words, so far as was practicable,

§ 199. Natural boundaries consisting of water must be specially discussed on account of the different kinds of boundary waters. Such kinds are rivers, lakes, landlocked seas, and the maritime belt.

(1) Boundary rivers¹ are such rivers as separate two different States from each other.² If such river is not navigable, the imaginary boundary line as a rule runs down the middle of the river,³ following all turnings of the border line of both banks of the river. If navigable, the boundary line as a rule runs through the middle of the so-called *Thalweg*, that is, the mid-channel of the river,⁴ and this general rule was adopted by the Treaties of Peace, except in special cases.⁵ But it is possible that the boundary line is the *border line* of the river, so that the whole bed belongs to one of the riparian States only.⁶ This is an exceptional case created by immemorial possession, by treaty, or by the fact that a State has occupied the lands on one side of a river at a time prior to the occupation of the lands on the other side by some other State.⁷ And it must be remembered that, since a river sometimes changes its course more or less, the boundary line is thereby also altered.⁸ In case a bridge is built over a boundary river, the boundary line runs, failing

Boundary
Waters.

and leave the actual delimitation to Boundary Commissions, which were to fix the frontier line on the spot in conformity with the provisions of the treaties. Maps were used to illustrate the boundaries; but in case of a discrepancy between the text of a treaty and a map, the text was to prevail.

¹ See Huber in *Z. V.*, i. (1906), pp. 29-52 and 159-217; Hyde in *A. J.*, vi. (1912), pp. 901-909, and Schultness, *op. cit.*, pp. 8-16 and 19-24.

² This case is not to be confounded with the other, in which a river runs through the lands of two different States. In this latter case the boundary line runs across the river.

³ Or its principal arm, if it has more than one.

⁴ Or its principal channel, if it has more than one.

⁵ *E.g.*, by the Treaty of Peace with Germany, Article 30.

⁶ See above, § 175.

⁷ See Twiss, i. §§ 147 and 148, and Westlake, i. p. 145; Hyde in *A. J.*, § vi. (1912), p. 905, and Schultness, *op. cit.*, pp. 8-10.

⁸ Unless it is otherwise provided by treaty (see, for example, Treaty of Peace with Germany, Article 30). Moreover, if a boundary river leaves its old bed and forms a new one, the boundary line remains in its old place. See below, § 235, and *State of Arkansas v. State of Tennessee*, (1918) 246 U.S. 153.

special treaty arrangements,¹ through the middle of the bridge.²

(2) Boundary lakes and land-locked seas are such as separate the lands of two or more different States from each other. The boundary line runs through the middle of these lakes and seas, but as a rule special treaties portion off such lakes and seas between riparian States.³

(3) The boundary line of the maritime belt is, according to details given above (§ 186), uncertain, since no unanimity prevails with regard to the width of the belt. It is, however, certain that the boundary line runs not nearer to the shore than three miles, or one marine league, from the low-water mark.

(4) In a narrow strait separating the lands of two different States the boundary line runs, either through the middle, or through the mid-channel,⁴ unless special treaties make different arrangements.

Boundary
Moun-
tains.

§ 200. Boundary mountains or hills are such natural elevations from the common level of the ground as separate the territories of two or more States from each other. Failing special treaty arrangements, the boundary line runs on the mountain ridge along with the watershed. But it is quite possible that boundary mountains belong wholly to one of the States which they separate.⁵

Boundary
Disputes.

§ 201. Boundary lines are, for many reasons, of such vital importance, that disputes relating thereto are inevitably very frequent and have often led to war. During the nineteenth century, however, a tendency began to prevail to settle such disputes peaceably. The simplest way in which this can be done is always by

¹ For an example where it is otherwise provided, see Treaty of Peace with Germany, Article 66, under which existing bridges across the Rhine within the limits of Alsace-Lorraine are to belong to France.

² As regards the boundary lines running through islands rising in

boundary rivers and through the abandoned beds of such rivers, see below, §§ 234 and 235.

³ See above, § 179, and Schulthess, *op. cit.*, pp. 16-18.

⁴ See Twiss, i. §§ 183 and 184, and above, § 194.

⁵ See Fiore, ii. No. 800.

a boundary treaty, provided the parties can come to terms.¹ In other cases arbitration can settle the matter, as, for instance, in the Alaska Boundary dispute between Great Britain (representing Canada) and the United States, settled in 1903.² Sometimes International Commissions are specially appointed to settle the boundary lines. In this way the boundary lines between Turkey, Bulgaria, Serbia, Montenegro, and Roumania were settled after the Berlin Congress of 1878. After the World War Boundary Commissions were constituted by the Treaties of Peace to settle many frontiers.³ It sometimes happens that the States concerned, instead of settling the boundary line, keep a strip of land between their territories under their joint tenure and administration, so that a so-called *condominium* comes into existence, as was done in the case of Moresnet (Kelmis) on the Prusso-Belgian frontier prior to the World War.⁴

§ 202. Whereas the term 'natural boundaries' in the theory and practice of the Law of Nations means natural signs which indicate the course of boundary lines, the same term is used politically⁵ in various different meanings. Thus the French often speak of the river Rhine as their 'natural' boundary, as the Italians do of the Alps. Thus, further, the zones within which the language of a nation is spoken are frequently termed that nation's 'natural' boundary. Again, the line enclosing such parts of the land as afford great facilities for defence against an attack is often called the 'natural' boundary of a State, whether or not these parts belong

Natural
Boun-
daries
sensu
politico.

¹ A good example of such a boundary treaty is that between Great Britain and the United States of America respecting the demarcation of the international boundary between the United States and the Dominion of Canada, signed at Washington on April 11, 1908. See

Martens, *N.R.G.*, 3rd Ser. iv. p. 191.

² See Balch, *The Alaska Frontier* (1903).

³ See above, § 198, n. 2.

⁴ See above, § 171 (1).

⁵ See Rivier, i. p. 166.

to the territory of the respective State. But such conceptions are political, and are outside the domain of International Law.

XI

STATE SERVITUDES

Vattel, ii. § 89—Hall, § 42*—Westlake, i. p. 61—Phillimore, i. §§ 281-283—Twiss, i. § 245—Taylor, § 252—Moore, i. §§ 163-168, ii. § 177—Hershey, Nos. 166-168—Bluntschli, §§ 353-359—Hartmann, § 62—Heffter, § 43—Holtzendorff in *Holtzendorff*, ii. pp. 242-252—Gareis, § 71—Liszt, §§ 8 and 19—Ullmann, § 99—Bonfils, Nos. 340-344—Despagnet, Nos. 190-192—Mérignhac, ii. pp. 366-368—Pradier-Fodéré, ii. Nos. 834-845, 1038—Rivier, i. pp. 296-303—Nys, ii. pp. 319-330—Calvo, iii. § 1583—Fiore, i. § 380, and *Code*, Nos. 1100-1102—Martens, i. §§ 94-95—Claus, *Die Lehre von den Staatsdienstbarkeiten* (1894)—Fabres, *Des Servitudes dans le Droit international* (1901)—Hollatz, *Begriff und Wesen der Staats-servituten* (1909)—Labrousse, *Des Servitudes en Droit international public* (1911)—Nys in *R.I.*, 2nd Ser. vii. (1905), pp. 118-125, and xiii. (1911), pp. 314-323—Basdevant in *R.G.*, xix. (1912), pp. 512-521—Potter in *A.J.*, ix. (1915), pp. 627-641.

Concep-
tion of
State Ser-
vitudes.

§ 203. State servitudes are those exceptional restrictions made by treaty on the territorial supremacy of a State by which a part or the whole of its territory is in a limited way made perpetually to serve a certain purpose or interest of another State. Thus a State may by a convention be obliged to allow the passage of troops of a neighbouring State, or may in the interest of a neighbouring State be prevented from fortifying a certain town near the frontier.

Servitudes must not be confounded¹ with those general restrictions upon territorial supremacy which, according to certain rules of the Law of Nations, concern all States alike. These restrictions are named 'natural' restrictions of territorial supremacy (*servitudes juris gentium naturales*), in contradistinction to the conven-

¹ This is done, for instance, by Heffter (§ 43), Martens (§ 94), Nys (ii. pp. 320 ff.), and Hall (§ 42*);

Hall speaks of the right of innocent use of territorial seas as a servitude.

tional restrictions (*servitutes juris gentium voluntariae*) which constitute the State servitudes in the technical sense of the term. Thus, for instance, it is not a State servitude, but a 'natural' restriction on territorial supremacy, that a State is obliged to admit the free passage of foreign merchantmen through its territorial maritime belt.

That State servitudes are of great importance, there can be no doubt. The vast majority¹ of writers and the practice of the States accept the conception of State servitudes, although they do not agree upon its definition or extent, and are often divided as to whether a particular restriction upon territorial supremacy is or is not a State servitude. But it was rejected by the Permanent Court of Arbitration at the Hague in the case of the *North Atlantic Coast Fisheries* (1910) between Great Britain and the United States,² mainly upon three grounds: (1) that a servitude in International Law predicated an express grant of a sovereign right; (2) that the doctrine of international servitudes originated in the peculiar and now obsolete conditions prevailing in the Holy Roman Empire; (3) that, being little suited to the principle of sovereignty which prevails in States under a constitutional Government and to the present international relations of sovereign States, it had found little, if any, support from modern publicists. It is hardly to be expected that this opinion of the Court will induce theory and practice to drop the conception of State servitudes, which is of great value. It suitably covers those restrictions on the territorial supremacy of

¹ The conception of State servitudes is rejected by Bulmerincq (§ 49), Gareis (§ 71), Liszt (§§ 8 and 19), Jellinek (*Allgemeine Staatslehre*, p. 366).

² See the official publication of the case, pp. 115-116; Hogg in the *Law Quarterly Review*, xxvi. (1910), pp.

415-417; Richards in the *Journal of the Society of Comparative Legislation*, New Ser. xi. (1910), pp. 18-27; Lansing in *A.J.*, v. (1911), pp. 1-31; Balch and Louter in *R.I.*, 2nd Ser. xiii. (1911), pp. 5-23, 131-157; Drago and Basdevant in *R.G.*, xix. (1912), pp. 5 and 421; Anderson in *A.J.*, vii. (1913), pp. 1-16.

the State by which a part or the whole of its territory is in a limited way made perpetually to serve a certain purpose or interest of another State. That it originated in the peculiar conditions of the Holy Roman Empire does not make it unfit for the conditions of modern life if its practical value can be demonstrated. Further, the assertion that it is but little suited to the principle of sovereignty which prevails in States under a constitutional Government, and has, therefore, found little, if any, support from modern publicists, does not agree with the facts. Lastly, the statement that a servitude in International Law predicated an express grant of a sovereign right, is not based on any other authority than the contention of the United States, which made this unfounded statement in presenting her case before the Tribunal. The fact is that a State servitude, although to a certain degree restricting the sovereignty (territorial supremacy) of the State concerned, does not confer a sovereign right upon the State in favour of which it is established, any more than does any other restriction upon sovereignty.¹

Subjects
of State
Servi-
tudes.

§ 204. Subjects of State servitudes are States only and exclusively, since State servitudes can exist between States only (*territorium dominans* and *territorium serviens*). Formerly some writers² maintained that private individuals and corporations were able to acquire a State servitude; but nowadays it is agreed that this is not possible, since the Law of Nations is a law between States only and exclusively. Whatever rights may be granted by a State to foreign individuals and corporations, such rights can never constitute State servitudes.

On the other hand, every State can acquire and grant State servitudes, although some States may, in con-

¹ See below, § 206 (1). The existence of State servitudes was recognised by the Cologne Court of Appeal in 1914 (see *A.J.*, viii. (1914),

pp. 858-860, 907-913).

² See, for instance, Bluntschli, § 353; Heffter, § 43.

sequence of their particular position within the Family of Nations, be prevented from acquiring or granting some special kind or another of State servitudes. Thus a neutralised State is in many points hampered in regard to acquiring and granting State servitudes, because it has to avoid everything that could drag it indirectly into war. Thus, further, half sovereign and part sovereign States may not be able to acquire and to grant certain State servitudes on account of their dependence upon their superior State. But apart from such exceptional cases, even not-full sovereign States can acquire and grant State servitudes, provided they have some international status.

§ 205. The object of State servitudes is always the whole or a part of the territory of the State the territorial supremacy of which is restricted by any such servitude. Since the territory of a State includes not only the land, but also the rivers which water the land, the maritime belt, the territorial subsoil, and the territorial atmosphere, all these, as well as the service of the land itself, can be an object of State servitudes. Thus a State may have a perpetual right of admittance for its subjects to the fishery in the maritime belt of another State, or a right to lay telegraph cables through a foreign maritime belt, or a right to make and use a tunnel through a boundary mountain, and the like. Or again, a State servitude might be created through a State acquiring a perpetual right to send military aircraft through the territorial atmosphere of a neighbouring State. It must, however, be emphasised that the open sea can never be the object of a State servitude, since it is no State's territory.

Object of
State Ser-
vitudes.

Since the object of State servitudes is the territory of a State, all such restrictions upon the territorial supremacy of a State as do not make a part or the whole of its territory itself serve a purpose or an interest of

another State are not State servitudes. The territory as the object is the mark of distinction between State servitudes and other restrictions on the territorial supremacy. Thus the perpetual restriction imposed upon a State by a treaty not to keep military, naval, or air forces, or not to keep an army, navy, or air force¹ beyond a certain size, is certainly a restriction on territorial supremacy, but is not, as some writers² maintain, a State servitude, because it does not make the territory of one State serve an interest of another. On the other hand, when a State submits to a perpetual right enjoyed by another State of passage of troops, or to the duty not to fortify a certain town, region, place, or island,³ or to the claim of another State for its subjects to be allowed the fishery within the former's territorial belt,⁴—

¹ See, for example, Part V. of the Treaties of Peace with Germany and Austria.

² See, for instance, Bluntschli, § 356.

³ As to the Aland Islands in the Baltic, see Article 32 of the Peace Treaty of Paris, 1856, and the annexed Convention of March 30, 1856 (Martens, *N.R.G.*, xv. pp. 780 and 788). See also below, § 522; Waultrin in *R.G.*, xiv. pp. 517-533; and *A.J.*, ii. (1908), p. 397. As to the coastal zone in Morocco, see Treaty between France and Spain of November 27, 1912, Article 6 (Martens, *N.R.G.*, 3rd Ser. vii. p. 323). As to the banks of the Rhine, see Treaty of Peace with Germany, Articles 42-44 and 180. As to Heligoland, see *ibid.*, Article 115. As to the coastal zone commanding the passage into the Baltic, see *ibid.*, Article 195, and below, § 568e. As to Czecho-Slovak territory on the right bank of the Danube to the south of Bratislava, see Treaty of Peace with Austria, Article 56.

⁴ Examples of such fishery servitudes are:—

(a) The former French fishery rights in Newfoundland, which were based on Article 13 of the Treaty of Utrecht, 1713, and on the Treaty of

Versailles, 1783. See the details regarding the Newfoundland Fishery Dispute, in Phillimore, i. § 195; Clauss, *op. cit.*, pp. 17-31; Geffcken in *R.I.*, xxii. p. 217; Brodhurst in the *Law Magazine and Review*, xxiv. p. 67. The French literature on the question is quoted in Bonfils, No. 342, n. 1. The dispute was settled by France's renunciation of the privileges due to her according to Article 13 of the Treaty of Utrecht, which took place by Article 1 of the Anglo-French Convention signed in London on April 8, 1904 (see Martens, *N.R.G.*, 2nd Ser. xxxii. p. 29). But France retains, according to Article 2 of the latter convention, the right of fishing for her subjects in certain parts of the territorial waters of Newfoundland.

(b) The fishery rights granted by Great Britain to the United States of America in certain parts of the British North Atlantic Coast by Article 1 of the Treaty of 1818, which gave rise to disputes extending over a long period. The dispute was settled by an award of the Hague Permanent Court of Arbitration given in September 1910, in which (see above, § 203) the Court refused to recognise the conception of State servitudes.

in all these and the like ¹ cases the territorial supremacy of a State is in such a way restricted that a part or the whole of its territory is made to serve the interest of another State, and such restrictions are therefore State servitudes.²

§ 206. According to different qualities different kinds of State servitudes must be distinguished.

Different
Kinds of
State Ser-
vitudes.

(1) Affirmative, active, or positive, are those servitudes which give the right to a State to perform certain acts on the territory of another State, such as to build and work a railway, to establish a custom-house, to let an armed force pass through a certain territory (*droit d'étape*), or to keep troops in a certain fortress, to use a port or an island as a coaling station, and the like. Also affirmative are those servitudes which give the right to a State to demand that its subjects shall be allowed to perform certain acts on the territory of another State, such as to fish within certain territorial waters, etc.³

(2) Negative, are such servitudes as give a right to a State to demand of another State that the latter shall abstain from exercising its territorial supremacy in certain ways. Thus a State can have a right to demand

¹ Phillimore (i. § 283) quotes two interesting State servitudes which belong to the past. According to Articles 4 and 10 of the Treaty of Utrecht, 1713, France was, in the interest of Great Britain, not to allow the Stuart Pretender to reside on French territory, and Great Britain was, in the interest of Spain, not to allow Moors and Jews to reside in Gibraltar.

² The controverted question whether neutralisation of a State creates a State servitude is answered by Clauss, *op. cit.* (p. 167), in the affirmative, but by Ullmann (§ 99), correctly, I think, in the negative. But a distinction must be drawn between neutralisation of a whole State and neutralisation of certain parts of a State. In the latter

case a State servitude is indeed created.

³ The contention of the United States, adopted by the Hague Arbitration Tribunal in 1910 in the *North Atlantic Coast Fisheries* case (see above, § 203), that a State servitude must confer a sovereign right upon the State in favour of which it is established, is untenable. The sovereignty of the State which grants a servitude to another State is indeed thereby somewhat restricted, but no sovereign right accrues in consequence to the grantee. For this reason, in the case of a fishery servitude, the grantee is not entitled to demand that its consent should be asked for general regulations for the preservation of the fisheries, or for customs purposes and the like.

that a neighbouring State shall not fortify certain towns near the frontier, or that another State shall not allow foreign men-of-war in a certain harbour.¹

(3) Military, are those State servitudes which are acquired for military purposes, such as the right to keep troops in a foreign fortress, or to let an armed force pass through foreign territory, or to demand that a town on foreign territory shall not be fortified, and the like.

(4) Economic, are those servitudes which are acquired for the purpose of commercial interests, traffic, and intercourse in general, such as the right of fisheries in foreign territorial waters, to build a railway on or lay a telegraph cable through foreign territory, and the like.

Validity
of State
Servi-
tudes.

§ 207. Since State servitudes, in contradistinction to personal rights (rights *in personam*), are rights inherent to the object with which they are connected (rights *in rem*), they remain valid and may be exercised however the ownership of the territory to which they apply may change. Therefore, if, after the creation of a State servitude, the part of the territory affected comes by subjugation or cession under the territorial supremacy of another State, such servitude remains in force. Thus, when the Alsatian town of Hüningen became German in 1871, and again, when it became French in 1918, the State servitude created by the Peace Treaty of Paris, 1815, that Hüningen should, in the interest of the Swiss canton of Basle, never be fortified, was not extinguished.² Thus, further, when in 1860 the former Sardinian provinces of Chablais and Faucigny, and the whole of the territory of Savoy to the north of Ugine, became French, the State servitude created by Article 92 of the Act of the Vienna Congress, 1815, that Switzerland should have

¹ Affirmative State servitudes consist in *patiendo*, negative servitudes in *non faciendo*. The rule of Roman Law *servitus in faciendo consistere*

neguit has been adopted by the Law of Nations.

² Details in Clauss, *op. cit.*, pp. 15-17.

temporarily during war the right to locate troops in these provinces, was not extinguished.¹

It is a moot point whether military State servitudes can be exercised in time of war by a belligerent if the State with whose territory they are connected remains neutral. Must such State, for the purpose of upholding its neutrality, prevent the belligerent from exercising the respective servitude—for instance, the right of passage of troops? ² There ought to be no doubt that the answer must be in the affirmative.

§ 208. State servitudes are extinguished by agreement between the States concerned, or by express or tacit ³ renunciation on the part of the State in whose interest they were created. They are not, according to the correct opinion, extinguished by reason of the territory involved coming under the territorial supremacy of another State. But it is difficult to understand why, although State servitudes are called into existence through treaties, it is sometimes maintained that the clause *rebus sic stantibus* ⁴ cannot be applied in case a vital change of circumstances makes the exercise of a State servitude unbearable. It is a matter of course that in such case the restricted State must previously try to come to terms with the State which is the subject of the servitude. But if an agreement

Extinction of State Servitudes.

¹ Details in Claus, *op. cit.*, pp. 8-15. See also Trésal, who, in *L'Annexion de la Savoie en France* (1913), asserted that through the annexation of these provinces by France, their neutralisation had fallen to the ground. Now, however, by Article 435 of the Treaty of Peace with Germany, the High Contracting Parties have declared that the provisions of Article 92 of the Final Act of the Vienna Congress, and other provisions relating to the neutralised zone of Savoy, are no longer consistent with present conditions, and 'note the agreement reached between the French Government and the Swiss Government for

the abrogation of the stipulations relating to this zone, which are and remain abrogated.'

² This question became practical when in 1900, during the South African War, Great Britain claimed, and Portugal was ready to grant, passage of troops through Portuguese territory in South Africa. See below, vol. ii. §§ 306 and 323; Claus, *op. cit.*, pp. 212-217; and Dumas in *R.G.*, xvi. (1909), pp. 289-316.

³ See Bluntschli, § 359b. The opposition of Claus, *op. cit.* (p. 219), and others to this sound statement of Bluntschli is not justified.

⁴ See below, § 539.

cannot be arrived at on account of the unreasonableness of the other party, the clause *rebus sic stantibus* may well be resorted to.¹

XII

MODES OF ACQUIRING STATE TERRITORY

Vattel, i. §§ 203-207—Hall, § 31—Westlake, i. pp. 86-118—Lawrence, §§ 74-78—Phillimore, i. §§ 222-225—Twiss, i. §§ 113-139—Halleck, i. p. 154—Taylor, §§ 217-227—Wheaton, §§ 161-163—Bluntschli, §§ 278-295—Hartmann, § 61—Heffter, § 69—Holtzendorff in *Holtzendorff*, ii. pp. 252-255—Gareis, § 70—Liszt, § 10—Ullmann, § 92—Bonfils, No. 532—Despagne, No. 378—Pradier-Fodéré, ii. Nos. 781-783—Mérignhac, ii. pp. 410-413—Rivier, i. § 12—Nys, ii. pp. 1-4—Calvo, i. § 263—Fiore, ii. Nos. 838-840—Martens, i. § 90—Heimbürger, *Der Erwerb der Gebietshoheit* (1888)—Jerusalem, *Ueber völkerrechtliche Erwerbsgründe* (1911).

Who can
acquire
State
Territory?

§ 209. Since States only and exclusively² are subjects of the Law of Nations, it is obvious that, as far as the Law of Nations is concerned, States³ solely can acquire State territory. But the acquisition of territory by an existing State and member of the Family of Nations must not be confounded, first, with the foundation of a new State, and, secondly, with the acquisition by private individuals or corporations of territory and of sovereignty over territory which lies outside the dominion of the Law of Nations.

(1) Whenever a multitude of individuals, living on, or entering into, a part of the surface of the globe which does not belong to the territory of any member of the Family of Nations, constitute themselves as a State

¹ See Bluntschli, § 359d and Pradier-Fodéré, ii. No. 845. Clauss, *op. cit.* (p. 222), and others oppose this sound statement likewise.

² Apart from the League of Nations.

³ There is no doubt that no full sovereign State is, as a rule, prevented by the Law of Nations from

acquiring more territory than it already owns, unless some treaty arrangement precludes it from so doing. As regards the question whether a neutralised State is, by its neutralisation, prevented from acquiring territory, see above, § 96, and below, § 215.

and nation on that part of the globe, a new State comes into existence. This State is not, by reason of its birth, a member of the Family of Nations. The formation of a new State is, as will be remembered from former statements,¹ a matter of fact, and not of law. It is through recognition, which is a matter of law, that such new State becomes a member of the Family of Nations and a subject of International Law. As soon as recognition is given, the new State's territory is recognised as the territory of a subject of International Law, and it matters not how this territory was acquired before the recognition.

(2) Not essentially different is the case in which a private individual or a corporation acquires land (together with sovereignty over it) in countries which are not under the territorial supremacy of a member of the Family of Nations. In all such cases acquisition is in practice made either by occupation of hitherto uninhabited land, for instance an island, or by cession from a native tribe living on the land. Acquisition of territory and sovereignty thereon in such cases takes place outside the dominion of the Law of Nations, and the rules of this law, therefore, cannot be applied. If the individual or corporation which has made the acquisition requires protection by the Law of Nations, he or it must either declare a new State to be in existence and ask for its recognition by the Powers, as in the case of the former Congo Free State,² or must ask a member of the Family of Nations to acknowledge the acquisition as having been made on its behalf.³

¹ See above, § 71.

² See above, § 101. The case of Sir James Brooke, who acquired in 1841 Sarawak, in North Borneo, and established an independent State there, of which he became the sovereign, may also be cited. Sarawak is under British protectorate, but the successor of Sir

James Brooke is still recognised as sovereign.

³ The matter is treated with great lucidity by Heimburger, *op. cit.*, pp. 44-77, who defends the opinion represented in the text against Twiss (i. Preface, p. x; also in *R.I.*, xv. p. 547, and xvi. p. 237) and other writers. See also Ullmann, § 93.

Former
Doctrine
concern-
ing Acqui-
sition of
Territory.

§ 210. No unanimity exists among writers on the Law of Nations with regard to the modes of acquiring territory on the part of the members of the Family of Nations. The topic owes its controversial character to the fact that the conception of State territory has undergone a great change since the appearance of the science of the Law of Nations. When Grotius created that science, State territory used to be still, as in the Middle Ages, more or less identified with the private property of the monarch of the State. Grotius and his followers applied, therefore, the rules of Roman Law concerning the acquisition of private property to the acquisition of territory by States.¹ As nowadays, as far as International Law is concerned, every analogy to private property has disappeared from the conception of State territory, the acquisition of territory by a State can mean nothing else than the acquisition of *sovereignty* over such territory. It is obvious that under these circumstances the rules of Roman Law concerning the acquisition of private property can no longer be applied. Yet the fact that they have been applied in the past has left traces which can hardly be obliterated; and they need not be obliterated, since they contain a good deal of truth in agreement with the actual facts. But the different modes of acquiring territory must be taken from the real practice of the States, and not from Roman Law, although the latter's terminology and common-sense basis may be made use of.

What
Modes of
Acquisi-
tion of
Territory
there are.

§ 211. States as living organisms grow and decrease in territory. If the historical facts are taken into consideration, different reasons may be found to account for the exercise of sovereignty by a State over the

¹ See above, § 168. The distinction between *imperium* and *dominium* in Seneca's *dictum: omnia rex imperio possidet, singuli dominio* was well known, and Grotius, ii. c. 3,

§ 4, mentions it, but the consequences thereof were nevertheless not deduced. (See Westlake, *Papers*, pp. 129-133, and Westlake, i. pp. 86-90.)

different sections of its territory. One section may have been ceded by another State, another section may have come into the possession of the owner in consequence of accretion, a third through subjugation, a fourth through occupation of no State's land. As regards a fifth section, a State may say that it has exercised its sovereignty over the same for so long a period that the fact of having had it in undisturbed possession is a sufficient title of ownership. Accordingly, five modes of acquiring territory may be distinguished, namely: cession, occupation, accretion, subjugation, and prescription. Most writers recognise these five modes. Some, however, do not recognise prescription; some assert that accretion creates nothing else than a modification of the territory of a State; and some do not recognise subjugation at all, or declare it to be only a special case of occupation. It is for these reasons that some writers recognise only two or three¹ modes of acquiring territory. Be that as it may, all modes, besides the five mentioned, enumerated by some writers, are in fact not special modes, but only special cases of cession.² And whatever may be the value of the opinions of publicists, so much is certain that the practice of the States recognises cession, occupation, accretion, subjugation, and prescription as distinct modes of acquiring territory.

§ 212. The modes of acquiring territory are correctly divided according as the title they give is derived from the title of a prior owner State, or not. Cession is therefore a derivative mode of acquisition, whereas occupation, accretion, subjugation, and prescription are original modes.³

¹ Thus Gareis (§ 70) recognises cession and occupation only, whereas Heimbürger (pp. 106-110) and Holtzendorff (ii. p. 254) recognise cession, occupation, and accretion only.

² See below, § 216. Such alleged special modes are sale, exchange,

gift, marriage contract, testamentary disposition, and the like.

³ Lawrence (§ 74) enumerates conquest (subjugation) and prescription besides cession as derivative modes. This is, however, merely the consequence of a peculiar conception of what is called a derivative mode of acquisition.

Original
and Deri-
vative
Modes of
Acquisi-
tion.

XIII

CESSION

Grotius, ii. c. 6—Hall, § 35—Lawrence, § 76—Phillimore, i. §§ 262-276—Twiss, i. § 138—Walker, § 10—Halleck, i. pp. 164-167—Taylor, § 227—Moore, i. §§ 83-86—Hershey, Nos. 174-178—Bluntschli, §§ 285-287—Hartmann, § 61—Heffter, §§ 69 and 182—Holtzendorff in *Holtzendorff*, ii. pp. 269-274—Gareis, § 70—Liszt, § 10—Ullmann, §§ 97-98—Bonfils, Nos. 564-571—Mérignhac, ii. pp. 487-498—Despagnet, Nos. 381-391—Pradier-Fodéré, ii. Nos. 817-819—Rivier, i. pp. 197-217—Nys, ii. pp. 10-37—Calvo, i. § 266—Fiore, ii. §§ 860-862, and *Code*, Nos. 147-164 and 1058—Martens, i. § 91—Heimbürger, *Der Erwerb der Gebietshoheit* (1888), pp. 110-120—Phillipson, *Termination of War and Treaties of Peace* (1916), pp. 277-334.

Concep-
tion of
Cession of
State
Territory.

§ 213. Cession of State territory is the transfer of sovereignty over State territory by the owner-State to another State. There is no doubt whatever that such cession is possible according to the Law of Nations, and history presents innumerable examples of such transfer of sovereignty. The Constitutional Law of the different States may or may not lay down special rules¹ for the transfer or acquisition of territory. Such rules can have no direct influence upon the rules of the Law of Nations concerning cession, since Municipal Law can neither abolish existing nor create new rules of International Law.² But if such municipal rules contain constitutional restrictions on the Government with regard to cession of territory, these restrictions are so far important that such treaties of cession concluded by heads of States or Governments as violate these restrictions are not binding.³

Subjects
of
Cession.

§ 214. Since cession is a bilateral transaction, it has two subjects—namely, the ceding and the acquiring State. Both subjects must be States, and only those

¹ See above, § 168.

² See below, § 497.

³ See above, § 21.

cessions in which both subjects are States concern the Law of Nations. Cessions of territory made to private persons and to corporations¹ by native tribes or by States outside the dominion of the Law of Nations do not fall within the sphere of International Law, neither do cessions of territory by native tribes made to States² which are members of the Family of Nations. On the other hand, cession of territory made to a member of the Family of Nations by a State as yet outside that family is real cession and a concern of the Law of Nations, since such State becomes through the treaty of cession in some respects a member of that family.³

§ 215. The object of cession is sovereignty over such territory as has hitherto already belonged to another State. As far as the Law of Nations is concerned, every State as a rule can cede a part of its territory to another State, or by ceding the whole of its territory can even totally merge in another State. However, since certain parts of State territory, as for instance rivers and the maritime belt, are inalienable appurtenances of the land, they cannot be ceded without a piece of land.⁴

Object of
Cession.

The controverted question whether permanently neutralised parts of a not permanently neutralised State can be ceded to another State must be answered in the affirmative,⁵ although the Powers certainly can exercise an intervention by right. On the other hand, a permanently neutralised State could not, except in the case of mere frontier regulation, cede a part of its neutralised territory to another State without the consent of the Powers.⁶ Nor could a State under suzerainty or protectorate cede a part or the whole of its

¹ See above, § 209 (2).

² See below, §§ 221 and 222.

³ See above, § 103.

⁴ See above, §§ 175 and 185.

⁵ Thus in 1860 Sardinia ceded her

neutralised provinces of Chablais and Faucigny to France. See above, § 207, where the present position of these provinces is mentioned.

⁶ See above, § 96, and the literature there quoted.

territory to a third State without the consent of the superior State. Thus, the Ionian Islands could not in 1863 have merged in Greece without the consent of Great Britain, which exercised a protectorate over these islands.

Form of
Cession.

§ 216. The only form in which a cession can be effected is an agreement embodied in a treaty between the ceding and the acquiring State. Such treaty may be the outcome of peaceable negotiations or of war, and the cession may be one with or without compensation.

If a cession of territory is the outcome of war, it is the treaty of peace which stipulates the cession among its other provisions. Such cession is regularly one without compensation, although certain duties may be imposed upon the acquiring State, as, for instance, of taking over a part of the debts of the ceding State corresponding to the extent and importance of the ceded territory, or that of giving the individuals domiciled on the ceded territory the option to retain their old citizenship or, at least, to emigrate.

Cessions which are the outcome of peaceable negotiations may be agreed upon by the interested States from different motives and for different purposes. Thus Austria, during war with Prussia and Italy in 1866, ceded Venice to France as a gift, and some weeks afterwards France on her part ceded Venice to Italy. The Duchy of Courland ceded in 1795 its whole territory to, and voluntarily merged thereby, in Russia; in the same way the then Free Town of Mulhouse merged in France in 1798, the Congo Free State in Belgium in 1908, and the Empire of Korea in Japan in 1910.

Cessions have in the past often been effected by transactions which are analogous to transactions in private business life. As long as absolutism was reigning over Europe, it was not at all rare for territory to be ceded in *marriage contracts* or by *testamentary disposi-*

tions.¹ In the interest of frontier regulations, but also for other purposes, *exchanges* of territory frequently take place. *Sale* of territory is quite usual; as late as 1867 Russia sold her territory in America to the United States for 7,200,000 dollars; in 1899 Spain sold the Caroline Islands to Germany for 25,000,000 pesetas; and in 1916 Denmark sold the islands of St. Thomas, St. John and St. Croix in the West Indies to the United States for 25,000,000 dollars. *Pledge* and *lease* are also made use of. Thus, the then Republic of Genoa pledged Corsica to France in 1768, Sweden pledged Wismar to Mecklenburg in 1803; China² leased in 1898 Kiaochau to Germany,³ Wei-Hai-Wei and the land opposite the island of Hong-Kong to Great Britain, and Port Arthur to Russia.⁴

Whatever may be the motive and the purpose of the transaction, and whatever may be the compensation, if any, for the cession, the ceded territory is transferred to the new sovereign with all the international obligations⁵ locally connected with the territory (*Res transit cum suo onere*, and *Nemo plus juris transferre potest, quam ipse habet*).

§ 217. The treaty of cession must be followed by actual tradition⁶ of the territory to the new owner-State, unless such territory is already occupied by the new owner, as in the case where the cession is the outcome of war and the ceded territory has been during such

Tradition
of the
Ceded
Territory.

¹ Phillimore, i. §§ 274-276, enumerates many examples of such cession. The question whether the monarch of a State under absolute government could nowadays by a testamentary disposition cede territory to another State must, I believe, be answered in the affirmative.

² See above, § 171 (3). The leases of Kiaochau and Port Arthur have been transferred to Japan, the first as a result of the World War, and the second as the result of the Russo-Japanese War. Cession may also take place under the disguise of an agreement according to which

territory comes under the 'administration' or under the 'use, occupation, and control' of a foreign State. See above, § 171 (2) and (4).

³ See Martens, *N.R.G.*, 2nd Ser. xxx. p. 326.

⁴ See Martens, *N.R.G.*, 2nd Ser. xxxii. pp. 89 and 90.

⁵ How far a succession of States takes place in the case of cession of territory has been discussed above, § 84.

⁶ This was indirectly recognised by Sir W. Scott in *The Fama*, (1804) 5 C. Rob. 106.

war in the military occupation of the State to which it is now ceded. But the validity of the cession does not depend upon tradition,¹ the cession being completed by ratification of the treaty of cession, and the capability of the new owner to cede the acquired territory to a third State at once without taking actual possession of it.² But of course the new owner-State cannot exercise its territorial supremacy thereon until it has taken physical possession of the ceded territory.

Veto of
Third
Powers.

§ 218. As a rule, no third Power has the right of *veto* with regard to a cession of territory. Exceptionally, however, such right may exist. It may be that a third Power has by a previous treaty acquired a right of pre-emption concerning the ceded territory, or that some early treaty has created another obstacle to the cession, as, for instance, in the case of permanently neutralised parts of a not permanently neutralised State.³ And the Powers have certainly the right of *veto* in case a permanently neutralised State desires to increase its territory by acquiring land through cession from another State.⁴ But even where no right of *veto* exists, a third Power might intervene for political reasons. For there is no duty on the part of third States to acquiesce in such cessions of territory as endanger the balance of power or are otherwise of vital importance.⁵ And a strong State will practically always interfere in case a cession of such a kind as menaces its vital interests is agreed upon. Thus, when in 1867 the reigning King of Holland proposed to sell Luxemburg to France, the North German Confederation intervened, and the cession was not effected, but Luxemburg became permanently neutralised.

¹ This is controversial. Many writers—see, for instance, Rivier, i. p. 203—oppose the opinion presented in the text.

² Thus France, to which Austria ceded in 1859 Lombardy, ceded this

territory on her part to Sardinia without previously having actually taken possession of it.

³ See above, § 215.

⁴ See above, §§ 209 n. 3 and 215.

⁵ See above, § 136.

§ 219. As the object of cession is sovereignty over the ceded territory, all such individuals domiciled thereon as are subjects of the ceding State become *ipso facto* by the cession subjects¹ of the acquiring State. The hardship involved in the fact that in all cases of cession the inhabitants of the territory who remain lose their old citizenship and are handed over to a new sovereign whether they like it or not, has created a movement in favour of the claim that no cession shall be valid until the inhabitants have by a plebiscite² given their consent to the cession. And several treaties³ of cession concluded during the nineteenth century stipulated that the cession should only be valid provided the inhabitants consented to it through a plebiscite. But it is doubtful whether the Law of Nations will ever make it a condition of every cession that it must be ratified by a plebiscite.⁴ The necessities of international policy may now and then allow or even demand such a plebiscite, but in most cases they will not allow it.⁵

The hardship of the inhabitants being handed over to a new sovereign against their will can be lessened by a stipulation in the treaty of cession binding the acquiring State to give the inhabitants of the ceded territory the option of retaining their old citizenship on making an express declaration. Many treaties of cession concluded during the second half of the nineteenth century contained this stipulation. But it must be emphasised that, failing a stipulation expressly forbidding it, the acquiring State may expel those in-

¹ See Keith, *The Theory of State Succession*, etc. (1907), pp. 42-45; Cogordan, *La Nationalité* (1890), pp. 317-398; Moore, iii. § 379.

² See Stoerk, *Option und Plebiscite* (1879); Rivier, i. p. 204; Freudenthal, *Die Volksabstimmung bei Gebietsabtretungen und Eroberungen* (1891); Bonfils, No. 570; Despagnet, No. 391; Ullmann, § 97.

³ See Rivier, i. p. 210, where all these treaties are enumerated.

⁴ Although Grotius (ii. c. vi. § 4) taught this to be necessary.

⁵ Thus in the Treaties of Peace by which the settlement after the World War is being effected some cessions are made to depend largely upon a plebiscite and others are not.

habitants who have made use of the option and retained their old citizenship, since otherwise the whole population of the ceded territory might actually consist of aliens and endanger the safety of the acquiring State.

The option to emigrate within a certain period, which is frequently stipulated in favour of the inhabitants of ceded territory, is another means of averting the charge that inhabitants are handed over to a new sovereign against their will. Thus Article 2 of the Peace Treaty of Frankfort, 1871, which ended the Franco-German War, stipulated that the French inhabitants of the ceded territory of Alsace and Lorraine should up to October 1, 1872, enjoy the privilege of transferring their domicile from the ceded territory to French soil.¹

Similar options have been accorded in the Treaties of Peace following the conclusion of the World War to the inhabitants of territories ceded under them. The terms of the option vary in each particular case; but the general principle applied has been that persons habitually resident in ceded territory acquire *ipso facto* the nationality of the State to which the territory has been transferred, and lose the nationality of the ceding State. Nevertheless such persons, if over eighteen years old, may opt for their old nationality, and if they exercise this option, their choice covers a wife and any children under eighteen years of age. They must, however, in that case remove to the territory of their old State.²

¹ The important question whether subjects of the ceding States who are born on the ceded territory but have their domicile abroad become *ipso facto* by the cession subjects of the acquiring State, must, I think, be answered in the negative, unless special treaty arrangements stipulate the contrary. Therefore, Frenchmen born in Alsace but domiciled at the time of the cession in Great Britain, would not have lost their French citizenship through the cession to

Germany but for Article 1, part 2, of the additional treaty of Dec. 11, 1871, to the Peace Treaty of Frankfort. (Martens, *N.R.G.*, xx. p. 847.) See Bonfils, No. 427, and Cogordan, *La Nationalité*, etc. (1890), p. 361.

² See for example Treaty of Peace with Germany, Articles 36 and 37, with regard to German territory ceded to Belgium. The general principle is there, and indeed in most cases, applied subject to an exception.

XIV

OCCUPATION

Hall, §§ 32-34—Westlake, i. pp. 98-113, 121-135—Lawrence, § 74—Phillimore, i. §§ 226-250—Twiss, i. §§ 118-126—Hershey, Nos. 179-187—Taylor, §§ 221-224—Walker, § 9—Wharton, i. § 2—Moore, i. §§ 80-81—Wheaton, §§ 165-174—Bluntschli, §§ 278-283—Hartmann, § 61—Heffter, § 70—Holtzendorff in *Holtzendorff*, ii. pp. 255-266—Gareis, § 70—Liszt, § 10—Ullmann, § 93-96—Bonfils, Nos. 536-563—Despagnet, Nos. 392-399—Mérignhac, ii. pp. 419-487—Pradier-Fodéré, ii. Nos. 784-802—Rivier, i. pp. 188-197—Nys, ii. pp. 58-122—Calvo, i. §§ 266-282—Fiore, ii. Nos. 841-849, and *Code*, Nos. 1059-1072—Martens, i. § 90—Tartarin, *Traité de l'Occupation* (1873)—Westlake, *Chapters*, pp. 155-187—Heimburger, *Der Erwerb der Gebietshoheit* (1888), pp. 103-155—Salomon, *L'Occupation des Territoires sans Maître* (1889)—Jèze, *Étude théorique et pratique sur l'Occupation*, etc. (1896)—Macdonell in the *Journal of the Society of Comparative Legislation*, New Ser. i. (1899), pp. 276-286—Waultrin in *R.G.*, xv. (1908), pp. 78, 185, 401.

§ 220. Occupation is the act of appropriation by a State through which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State. Occupation as a mode of acquisition differs from subjugation¹ chiefly in that the subjugated territory previously belonged to another State. Again, occupation differs from cession in that, through cession, the acquiring State receives sovereignty over the territory concerned from the former owner-State. Cession, therefore, is a derivative mode of acquisition, whereas occupation is an original mode. And it must be emphasised that occupation can only take place by and for a State;² it must be a State act, that is, it must be performed in the service of a State, or it must be acknowledged by a State after its performance.

§ 221. Only such territory can be the object of occupation as is no State's land, whether entirely uninhabited, as *e.g.* an island, or inhabited by natives whose community is not to be considered as a State. Natives may

Concep-
tion of
Occupation.

Object of
Occupation.

¹ See below, § 236.

² See above, § 209.

live on a territory under a tribal organisation which need not be regarded as a State; and even civilised individuals may live and have private property on a territory without forming themselves into a State proper which exercises sovereignty over such territory. But territory of any State, even though it is entirely outside the Family of Nations, is not a possible object of occupation; and it can only be acquired through cession¹ or subjugation. On the other hand, a territory which once belonged to a State, but has been afterwards abandoned, is a possible object for occupation by another State.²

Since the open sea is free, no part of it can be the object of occupation, nor can rocks or banks in the open sea, although lighthouses may be built on them.³ Likewise the bed of the sea cannot be an object of occupation,⁴ but the subsoil⁵ of the bed of the open sea may become the object of occupation through driving mines and piercing tunnels from the coast.⁶

Occupation, how effected.

§ 222. Theory and practice agree nowadays upon the rule that occupation is effected through taking possession of, and establishing an administration over, the territory in the name of, and for, the acquiring State. Occupation thus effected is *real* occupation, and, in contradistinction to *fictitious* occupation, is named *effective* occupation. Possession and administration are the two essential facts that constitute an effective occupation.

(1) *Possession*.—The territory must really be taken

¹ See above, § 214.

² See below, §§ 228 and 247.

³ See above, § 190a.

⁴ See below, § 281 n.

⁵ See below, §§ 287c and 287d.

⁶ When, in 1909, Admiral Peary reached the North Pole and hoisted the flag of the United States, the question was discussed whether the

North Pole could be the object of occupation. The question must, I believe, be answered in the negative since there is no land at the North Pole. See Scott in *A.J.*, iii. (1909), pp. 928-941, and Balch in *A.J.*, iv. (1910), pp. 265-275. As regards the South Pole, see the *Law Magazine and Review*, xxxvii. (1912), pp. 326-328.

into possession by the occupying State. For this purpose it is necessary that it should take the territory under its sway (*corpus*) with the intention of acquiring sovereignty over it (*animus*). This can only be done by a settlement on the territory accompanied by some formal act which announces both that the territory has been taken possession of and that the possessor intends to keep it under his sovereignty. It usually consists either of a proclamation or of the hoisting of a flag. But such formal act by itself constitutes fictitious occupation only, unless there is left on the territory a settlement which is able to keep up the authority of the flag. On the other hand, it is immaterial whether or not some agreement is made with the natives by which they submit themselves to the sway of the occupying State. Any such agreement is usually neither understood nor appreciated by them, and even if the natives really do understand its meaning, it has a moral value only.¹

(2) *Administration*.—After having, in the aforementioned way, taken possession of a territory, the possessor must establish some kind of administration thereon which shows that the territory is really governed by the new possessor. If, within a reasonable time after the act of taking possession, the possessor does not establish some responsible authority which exercises governing functions, there is then no effective occupation, since in fact no sovereignty is exercised by any State over the territory.

§ 223. In former times, the two conditions of possession and administration, which now make the occupation effective, were not considered necessary for the acquisition of territory through occupation. In the age of the discoveries,

Inchoate
Title of
Dis-
covery.

¹ If an agreement with natives were legally important, the territory would be acquired by cession, and not by occupation. But although it is nowadays quite usual to ob-

tain a cession from a native chief, this is, nevertheless, not cession in the technical sense of the term in International Law; see above, § 214.

States maintained that the fact of discovering a hitherto unknown territory was equivalent to acquisition through occupation by the State in whose service the discoverer made his explorations. And although later on a real *taking possession* was considered necessary, it was not until the eighteenth century that the writers on the Law of Nations postulated an *effective* occupation,¹ or until the nineteenth century that the practice of the States accorded with this postulate. But although nowadays discovery does not constitute acquisition through occupation, it is nevertheless not without importance. It is agreed that discovery gives to the State in whose service it was made an *inchoate* title; it 'acts as a temporary bar to occupation by another State'² for such a period as is reasonably sufficient for effectively occupying the discovered territory. If the period lapses without any attempt by the discovering State to turn its *inchoate* title into a *real* title of occupation, the *inchoate* title perishes, and any other State can now acquire the territory by means of an effective occupation.

Notifica-
tion of
Occupation
to
other
Powers.

§ 224. No rule of the Law of Nations exists which makes notification of occupation to other Powers a necessary condition of its validity. As regards all future occupations on the *African* coast the Parties to the General Act of the Berlin Congo Conference of 1885 stipulated³ that occupation should be notified to one another. But this act has been abrogated.⁴

Extent of
Occupation.

§ 225. Since an occupation is valid only if effective, it is obvious that the extent of an occupation ought only to reach over so much territory as is effectively occupied. In practice, however, the interested States have neither acted in the past, nor do they at present act, in conformity with any such rule; on the contrary, they have always tried to attribute to their occupation

¹ See Vattel, i. § 208.

² Thus Hall, § 32, p. 105.

³ Article 34.

⁴ See Convention signed at St. Germain on September 10, 1919, Treaty Ser. No. 18 (1919), Cmd. 477.

a much wider area. Thus it has been maintained that an effective occupation of the land at the mouth of a river is sufficient to bring under the sovereignty of the occupying State the whole territory through which such river and its tributaries run up to the very crest of the watershed.¹ Again, it has been maintained that, when a coast-line has been effectively occupied, the extent of the occupation reaches up to the watershed of all such rivers as empty into the coast-line.² And it has, thirdly, been asserted that effective occupation of a territory makes the sovereignty of the possessor extend also over neighbouring territories as far as it is necessary for the integrity, security, and defence of the really occupied land.³ But all these and other fanciful assertions have no basis. In truth, no general rule can be laid down beyond the above, that occupation reaches as far as it is effective. How far it is effective is a question in each particular case. It is obvious that when the agent of a State takes possession of a territory and makes a settlement on a certain spot of it, he intends thereby to acquire a vast area by his occupation. But everything depends, not upon his intention, but upon how far around the settlement or settlements the responsible authority governing the territory in the name of the possessor succeeds by degrees in establishing its sovereignty. The payment of a tribute on the part of tribes settled far away, the fact that flying columns of the military or the police sweep, when necessary, remote spots, and many other facts, can show how far round the settlements the possessor is really able to assert the established authority. But it will always be

¹ Claim of the United States in the Oregon Boundary Dispute (1827) with Great Britain. See Twiss, i. §§ 126 and 127, and his *The Oregon Question Examined* (1846); Phillimore, i. § 250; Hall, § 33.

² Claim of the United States in

their dispute with Spain concerning the boundary of Louisiana (1805), approved of by Twiss, i. § 125.

³ This is the so-called 'right of contiguity,' approved of by Twiss, i. §§ 124 and 131. See also Wright in *A.J.*, xii. (1918), pp. 519-521.

difficult to mark exactly in this way the boundary of an effective occupation, since naturally the tendency prevails to extend the sway constantly and gradually over a wider area. It is, therefore, a well-known fact that disputes concerning the boundaries of occupations can only rarely be decided on the basis of strict law; they must nearly always be compromised, whether by a treaty or by arbitration.¹

Protec-
torate as
Precursor
of Occupa-
tion.

§ 226. In the second half of the nineteenth century, the desire of States to acquire as colonies vast territories which they were not at once able to occupy effectively led to agreements with the chiefs of natives inhabiting unoccupied territories, by which these chiefs committed themselves to the 'protectorate' of States that are members of the Family of Nations. These so-called protectorates are certainly not protectorates in the technical sense of the term, which denotes that relationship between a strong and a weak State where by a treaty the weak State has put itself under the protection of the strong and transferred to the latter the management of its more important international relations.² Neither can they be compared with the protectorate which members of the Family of Nations exercise over such non-Christian States as are outside that family,³ because the respective chiefs of natives are not the heads of States, but heads of tribal communities only. Such agreements, although they are named 'protectorates,' are nothing else than steps taken to exclude other Powers from occupying the respective territories. They give, like discovery, an inchoate title, and are the precursors of future occupations.

§ 227. The uncertainty of the extent of an occupa-

¹ The Institute of International Law, in 1888, at its meeting in Lausanne, adopted a 'Projet de Déclaration internationale relative aux Occupations de Territoires,' com-

prising ten articles; see *Annuaire*, x. p. 201.

² See above, §§ 92 and 93.

³ See above, § 94.

tion, and the tendency of every colonising State to extend its occupation constantly and gradually into the interior, or 'hinterland,' of an occupied territory, led several States with colonies in Africa to secure for themselves 'spheres of influence' by international treaties with other interested Powers. 'Sphere of influence' is therefore the name of territory exclusively reserved for future occupation by a Power which has effectively occupied adjoining territories. In this way disputes may be avoided for the future, and the interested Powers can gradually extend their sovereignty over vast territories without coming into conflict with other Powers. Thus, to give some examples, Great Britain concluded treaties regarding spheres of influence with Portugal¹ in 1890, with Italy² in 1891, with Germany³ in 1886 and 1890, and with France⁴ in 1898.⁵

Spheres of Influence.

§ 228. As soon as a territory has been occupied by a member of the Family of Nations, it comes within the sphere of the Law of Nations, because it constitutes a portion of the territory of a subject of International Law. No other Power can acquire it thereafter through occupation, unless the occupying State has either intentionally withdrawn from it or has been successfully driven away by the natives without attempting or being able to reoccupy it.⁶ On the other hand, the Power which assumes sovereignty over the occupied territory is thereafter responsible for all events of international importance on the territory. It has, in particular, to keep up a certain order among the native tribes, so as

Consequences of Occupation.

¹ See Martens, *N.R.G.*, 2nd Ser. xviii. p. 154.

² See Martens, *N.R.G.*, 2nd Ser. xviii. p. 175.

³ See Martens, *N.R.G.*, 2nd Ser. xii. p. 298, and xvi. p. 894.

⁴ See Martens, *N.R.G.*, 2nd Ser. xxix. p. 116.

⁵ Protectorates and spheres of influence are exhaustively treated in Hall, *Foreign Powers and Jurisdiction of the British Crown*, §§ 92-105; but Hall fails to distinguish between protectorates over Eastern States and protectorates over native tribes.

⁶ See below, § 247.

to restrain them from acts of violence against neighbouring territories, and to punish them for such acts if committed.

A question of some importance is how far occupation affects private property of the inhabitants of the occupied territory. As according to the modern conception of State territory, the latter is not identical with private property of the State, occupation only brings a territory under the sovereignty of the occupying State, and therefore does not affect existing private property of the inhabitants. In the age of the discoveries, occupation was indeed considered to include a title to property over the whole occupied land; but nowadays this can no longer be maintained. Being now their sovereign, the occupying State may impose any burdens it likes on its new subjects, and may, therefore, even confiscate their private property; but occupation, as a mode of acquiring territory, does not of itself affect private property thereon. If the Municipal Law of the occupying State does give to it a title to private property over the whole occupied land, such a title is not based on International Law.

XV

ACCRETION

Grotius, ii. c. 8, §§ 8-16—Hall, § 37—Lawrence, § 75—Phillimore, i. §§ 240-241—Twiss, i. §§ 131 and 154—Moore, i. § 82—Hershey, No. 169—Bluntschli, §§ 294-295—Hartmann, § 61—Heffter, § 69—Holtzendorff in *Holtzendorff*, ii. pp. 266-268—Gareis, § 22—Liszt, § 10—Ullmann, § 92—Bonfils, No. 533—Despagnet, No. 379—Pradier-Fodéré, ii. Nos. 803-816—Rivier, i. pp. 179-180—Nys, ii. pp. 4-10—Calvo, i. § 266—Fiore, ii. No. 852, and *Code*, Nos. 1073-1075—Martens, i. § 90—Heimbürger, *Der Erwerb der Gebietshoheit* (1888), p. 106.

Concep-
tion of
Accre-
tion.

§ 229. Accretion is the name for the increase of land through new formations. Such new formations may be only a modification of the existing State territory,

as, for instance, where an island rises within a river, or a part of a river, which is totally within the territory of one and the same State; and in such case there is no increase of territory to correspond with the increase of land. On the other hand, many new formations occur which really do enlarge the territory of the State to which they accrue, as, for instance, where an island rises within the maritime belt. And it is a customary rule of the Law of Nations that enlargement of territory, if any, created through new formations, takes place *ipso facto* by the accretion, without the State concerned taking any special step for the purpose of extending its sovereignty. Accretion must, therefore, be considered as a mode of acquiring territory.

§ 230. New formations through accretion may be artificial or natural. They are artificial if they are the outcome of human work. They are natural if they are produced through operation of nature. And within the circle of natural formations different kinds must again be distinguished—namely, alluvions, deltas, newborn islands, and abandoned river-beds.

Different
Kinds of
Accre-
tion.

§ 231. Artificial formations are embankments, breakwaters, dykes, and the like, built along the river or the coast-line of the sea. As such artificial new formations along the bank of a boundary river may more or less push the volume of water so far as to encroach upon the other bank of the river, and as no State is allowed to alter the natural condition of its own territory to the disadvantage¹ of the natural conditions of a neighbouring State territory, a State cannot build embankments, and the like, of such kind without a previous agreement with the neighbouring State. But every State may construct such artificial formations as far into the sea beyond the low-water mark as it likes, and thereby gain considerably in land and also in territory,

Artificial
Forma-
tions.

¹ See above, § 127.

since the maritime belt, (which is at least three miles wide), is now to be measured from the extended shore.

Allu-
vions,

§ 232. Alluvion is the name for an accession of land washed up on the seashore or on a river-bank by the waters. Such accession is as a rule produced by a slow and gradual process, but sometimes also through a sudden act of violence, the stream detaching a portion of the soil from one bank of a river, carrying it over to the other bank, and embedding it there so as to be immovable (*avulsio*). Through alluvions the territory of a State may be considerably enlarged. For if the alluvion takes place on the shore, the extent of the territorial maritime belt is now to be measured from the extended shore. And if the alluvion takes place on the one bank of a boundary river, and the course of the river is thereby naturally so altered that the waters in consequence cover a part of the other bank, the boundary line, which runs through the middle or through the mid-channel,¹ may thereby be extended into former territory of the other riparian State.

Deltas

§ 233. Similar to alluvions are deltas. Delta is the name for a tract of land at the mouth of a river shaped like the Greek letter Δ , and owing its existence to a gradual deposit by the river of sand, stones, and earth on one particular place at its mouth. As the deltas are continually increasing, the accession of land they produce may be very considerable, and, according to the Law of Nations, is to be considered an accretion to the territory of the State to which the mouth of the river belongs, although the delta may be formed outside the territorial maritime belt. It is evident that in the latter case an increase of territory is the result, since the maritime belt is now to be measured from the shore of the delta.

¹ See above, § 199 (1).

§ 234. The natural processes which create alluvions on the shore and banks, and deltas at the mouths of rivers, together with other processes, lead to the birth of new islands. If they rise on the high seas outside the territorial maritime belt, they are no State's land, and may be acquired through occupation on the part of any State. But if they rise in rivers, lakes, and within the maritime belt, they are, according to the Law of Nations, considered accretions to the neighbouring land. New islands in boundary rivers which rise within the boundary line of one of the riparian States accrue to the land of such State, and islands which rise upon the boundary line are divided by it into parts which accrue to the land of the riparian States concerned. If an island rises within the territorial maritime belt, it accrues to the land of the littoral State, and the extent of the maritime belt is now to be measured from the shore of the new-born island.

New-born
Islands.

An illustrative example is the case¹ of *The Anna*. In 1805, during war between Great Britain and Spain, the British privateer *Minerva* captured the Spanish vessel *Anna* near the mouth of the river Mississippi. When brought before the British Prize Court, the United States claimed the captured vessel on the ground that she was captured within the American territorial maritime belt. Lord Stowell gave judgment in favour of this claim, because, although it appeared that the capture did actually take place more than three miles off the coast of the continent, the place of capture was within three miles of some small mud-islands composed of earth and trees drifted down into the sea.

§ 235. It happens sometimes that a river abandons its bed entirely or dries up altogether. If it was a navigable boundary river, the boundary line continues

Aban-
doned
River-
beds.

¹ See 5 C. Rob. 373. See also *The Secretary of State for India v.*

Sri Raja Chellikani Rama Rao, (1916) 32 T.L.R. 652.

to run along the middle of the old Thalweg in the abandoned bed.¹ But often this cannot be ascertained, and in such cases² the boundary line is considered to run through the middle of the abandoned bed, although the territory of one riparian State may become thereby enlarged, and that of the other diminished.

XVI

SUBJUGATION

Vattel, iii. §§ 199-203—Hall, §§ 204-205—Lawrence, § 77—Halleck, ii. pp. 501-534—Taylor, § 220—Walker, § 11—Hershey, No. 171—Wheaton, § 165—Moore, i. § 87—Bluntschli, §§ 287-289, 701-702—Heffter, § 178—Liszt, § 10—Ullmann, §§ 92 and 97—Bonfils, No. 535—Despagnet, Nos. 387-390—Rivier, i. pp. 181-182, ii. 436-441—Nys, ii. pp. 44-57—Calvo, v. §§ 3117, 3118—Fiore, ii. No. 863, iii. No. 1693, and *Code*, Nos. 1083-1086—Martens, i. § 91—Holtzendorff, *Eroberung und Eroberungsrecht* (1871)—Heimburger, *Der Erwerb der Gebietshoheit* (1888), pp. 121-132—Westlake in the *Law Quarterly Review*, xvii. (1901), p. 392, now reprinted in Westlake, *Papers*, pp. 475-489—Phillipson, *Termination of War and Treaties of Peace* (1916), pp. 9-51.

Concep-
tion of
Conquest
and of
Subjuga-
tion.

§ 236. Conquest is the taking possession of enemy territory through military force in time of war. Conquest alone does not *ipso facto* make the conquering State the sovereign of the conquered territory, although such territory comes through conquest for the time under the sway of the conqueror. Conquest is only a mode of acquisition if the conqueror, after having firmly established the conquest, formally annexes the territory. Such annexation makes the enemy State cease to exist, and thereby brings the war to an end. And as such ending of war is named subjugation, it is conquest followed by subjugation, and not conquest alone, which gives a title, and is a mode of acquiring territory.³ It is, however, quite usual to speak of title

¹ See above, § 199.

² As in the case of non-navigable rivers.

³ Concerning the distinction between conquest and subjugation, see below, vol. ii. § 264.

by conquest, and everybody knows that subjugation after conquest is thereby meant. But it must be specially mentioned that, if a belligerent conquers a part of the enemy territory and afterwards makes the vanquished State cede the conquered territory in the treaty of peace, the mode of acquisition is not subjugation but cession.¹

§ 237. Some writers ² maintain that subjugation is only a special case of occupation, because, as they assert, through conquest the enemy territory becomes no State's land, and the conqueror can acquire it by turning his military occupation into absolute occupation. Yet this opinion cannot be upheld, because military occupation, which is conquest, in no way makes enemy territory no State's land. Conquered enemy territory, although actually in possession and under the sway of the conqueror, remains legally under the sovereignty of the enemy until through annexation it comes under the sovereignty of the conqueror. Annexation turns the conquest into subjugation. It is the very annexation which *uno actu* makes the vanquished State cease to exist, and brings the territory under the conqueror's sovereignty. Thus the subjugated territory has not for one moment been no State's land, but passes from the enemy to the conqueror, not through cession, but through annexation.

Subjugation in contradistinction to Occupation.

¹ See above, § 216. Annexation by a State of territory hitherto under its administration, or leased to it, or granted to it for its 'use, occupation, and control' (see above, § 171 (2)-(4)), is not subjugation because the annexing State was already exercising sovereignty over the territory in question. Examples of annexations of this kind are the annexation by Austria in 1908 of the Turkish provinces of Bosnia and Herzegovina, and of the Turkish island Ada-Kalé in the Danube in 1913 (these territories having been

under her administration since 1878), and the annexation by Great Britain immediately after the outbreak of war with Turkey in 1914 of the island of Cyprus, which had been under British administration since 1878. Such annexations without the consent of the State which in law owns the territory are certainly unlawful in time of peace, and of doubtful legality in war. However this may be, they are not a regular mode of acquiring territory.

² Holtzendorff, ii. p. 255; Heimbürger, p. 128; Salomon, p. 24.

Justification of Subjugation as a Mode of Acquisition.

§ 238. As long as a Law of Nations has been in existence, the States, as well as the vast majority of writers, have recognised subjugation as a mode of acquiring territory. Its justification lies in the fact that war is a contention between States for the purpose of overpowering one another. States which go to war know beforehand that they risk more or less their very existence, and that it may be a necessity for the victor to annex the conquered enemy territory, be it in the interest of national unity or of safety against further attacks, or for other reasons. One must hope that the time will come when war will disappear entirely, but, as long as war exists, subjugation will also be recognised. If some writers¹ refuse to recognise subjugation at all as a mode of acquiring territory, they show a lack of insight into the historical development of States and nations.²

Subjugation of the Whole or of a Part of Enemy Territory.

§ 239. Subjugation is, as a rule, a mode of acquiring the entire enemy territory. The actual process is regularly that the victor destroys the enemy military forces, takes possession of the enemy territory, and then annexes it, although the head and the Government of the extinguished State may have fled, and may protest, and still keep up a claim. Thus after the war with Austria and her allies in 1866, Prussia subjugated the territories of the Duchy of Nassau, the Kingdom of Hanover, the Electorate of Hesse-Cassel, and the Free Town of Frankfort-on-the-Maine; and Great Britain subjugated in 1901 the territories of the Orange Free State and the South African Republic.

But it is possible for a State to conquer and annex *a part* of enemy territory, either when the war ends by a

¹ Bonfils, No. 535; Fiore, ii. No. 863, iii. No. 1693, and *Code*, No. 7078. See also Despagnet, Nos. 387-390.

² It should be mentioned that the

Pan-American Congress at Washington, 1890, passed a resolution that conquest should hereafter not be a mode of acquisition of territory in America; see Moore, i. § 87.

treaty of peace in which the vanquished State, without ceding the conquered territory, submits silently¹ to the annexation, or by simple cessation of hostilities.²

It must, however, be emphasised that such a mode of acquiring a part of enemy territory is totally different from forcibly taking possession of a part thereof during the continuance of war. Such a conquest, although the conqueror may intend to keep the conquered territory and therefore to annex it, does not confer a title as long as the war has not terminated either through simple cessation of hostilities or by a treaty of peace. Therefore, the practice, which sometimes prevails, of annexing a conquered part of enemy territory during war cannot be approved. For annexation of conquered enemy territory, whether of the whole or of part, confers a title only after a *firmly established* conquest, and so long as war continues, conquest is not firmly established.³ For this reason⁴ the annexation of the Orange Free State in May 1900, and of the South African Republic in September 1900, by Great Britain during the Boer War was premature. So also was the annexation of Tripoli and Cyrenaica by Italy during the Turco-Italian War in November 1911.

§ 240. Although subjugation is an original mode of acquisition, since the sovereignty of the acquiring State is not derived from that of the State formerly owning the territory, the new owner-State is nevertheless the successor of the former owner-State as regards many points which have been discussed above (§ 82). It must be specially mentioned that, as far as the Law of Nations⁵ is concerned, the subjugating State does not acquire the private property of the inhabitants of the annexed

Consequences of Subjugation.

¹ See below, vol. ii. § 273.

² See below, vol. ii. § 263.

³ See below, vol. ii. § 60, concerning guerilla war after the termination of real war. Many writers, however, deny that a conquest is firmly

established as long as guerilla war is going on.

⁴ See below, vol. ii. § 167.

⁵ *United States v. Percheman*, (1833) 7 Peters 51, and Sayre in *A.J.*, xii. (1918), pp. 475-497.

territory. Being now their sovereign, it may indeed impose any burdens it pleases on its new subjects—it may even confiscate their private property, since a sovereign State can do what it likes with its subjects—but subjugation itself does not by International Law touch or affect private property.

As regards the national status of the subjects of the subjugated State, doctrine and practice agree that such enemy subjects as are domiciled on the annexed territory and remain there after annexation become *ipso facto* by the subjugation¹ subjects of the subjugating State. But the national status of such enemy subjects as are domiciled abroad and do not return, and further of such as leave the country before the annexation or immediately afterwards, is matter of dispute. Some writers maintain that these individuals do in spite of their absence become subjects of the subjugating State; others emphatically deny it. Whereas the practice of the United States of America seems to be in conformity with the latter opinion,² the practice of Prussia in 1866 was in conformity with the former. Thus in the case of Count Platen-Hallermund, a Cabinet Minister of King George v. of Hanover, who left Hanover with his King before the annexation in 1866 and was in 1868 prosecuted for high treason before the Supreme Prussian Court at Berlin, this court decided that the accused had become a Prussian subject through the annexation of Hanover.³ I believe that a distinction must be made between those individuals who leave the country *before*

¹ See *Campbell v. Hall*, (1774) 1 Cowper 208, and *United States v. Repentigny*, (1866) 5 Wallace 211. The case is similar to that of cession: see above, § 219; Keith, *The Theory of State Succession* (1907), pp. 45 and 48; Moore, iii. § 379; Edwards in the *Journal of the Society of Comparative Legislation*, New Ser. xv. (1915), pp. 108-111.

² See Halleck, ii. p. 476.

³ See Halleck, ii. p. 476, on the one hand, and, on the other, Rivier, ii. p. 436. Valuable opinions of Zachariae and Neumann, who deny that Count Platen was a Prussian subject, are printed in the *Deutsche Strafrechts-Zeitung* (1868), pp. 304-320.

and those who leave it *after* annexation. The former are not under the sway of the subjugating State at the time of annexation, and, since the personal supremacy of their home State terminates with its extinction through annexation, they would seem to be outside the sovereignty of the subjugating State. But those individuals who leave the country *after* annexation leave it at a time when they have become subjects of the new sovereign, and they therefore remain such subjects even after they have left the country, for there is no rule of the Law of Nations in existence which obliges a subjugating State to grant the privilege of emigration¹ to the inhabitants of the conquered territory.

Different from the fact that enemy subjects become through annexation subjects of the subjugating State is the question what position they acquire within it. This question is one of Municipal, and not of International Law. The subjugating State can, if it likes, allow them to emigrate and to renounce their newly acquired citizenship, and its Municipal Law can put them in any position it likes, and can in particular grant or refuse them the same rights as those which its citizens by birth enjoy.

§ 241. Although subjugation is an original mode of acquiring territory, and no third Power has as a rule² a Veto of
Third
Powers. right of intervention, the conqueror has not in fact an unlimited possibility of annexation of the territory of the vanquished State. When the balance of power is endangered, or when other vital interests are at stake, third Powers can and will intervene, and history records many instances of such interventions. But it must be emphasised that the validity of the title of the subju-

¹ Both Westlake and Halleck state that the inhabitants *must* have a free option to stay or leave the country; but there is no rule of International Law which imposes the duty upon a

subjugating State to grant this option.

² But this rule has exceptions, as in the case of a State whose independence and integrity have been guaranteed by one or more Powers.

gating State does not depend upon recognition on the part of other Powers. Nor is a mere protest of a third Power of any legal weight.

XVII

PRESCRIPTION

Grotius, ii. c. 4—Vattel, ii. §§ 140-151—Hall, § 36—Westlake, i. pp. 94-96—Lawrence, § 78—Phillimore, i. §§ 251-261—Twiss, i. § 129—Taylor, §§ 218-219—Walker, § 13—Wheaton, § 164—Hershey, No. 170—Moore, i. § 88—Bluntschli, § 290—Hartmann, § 61—Heffter, § 12—Holtzendorff in *Holtzendorff*, ii. p. 255—Ullmann, § 92—Bonfils, No. 534—Mérignhac, ii. pp. 415-418—Despagnet, No. 380—Pradier-Fodéré, ii. Nos. 820-829—Rivier, i. pp. 182-184—Nys, ii. pp. 38-44—Calvo, i. §§ 264-285—Fiore, ii. Nos. 850-851, and *Code*, Nos. 1079-1082—Martens, i. § 90—G. F. Martens, §§ 70-71—Heimburger, *Der Erwerb der Gebietshoheit* (1888), pp. 140-155—Audinet in *R.G.*, iii. (1896), pp. 313-325—Ralston in *A.J.*, iv. (1910), pp. 133-144.

Concep-
tion of
Prescrip-
tion.

§ 242. Since the existence of a science of the Law of Nations, there has always been opposition to prescription as a mode of acquiring territory. Grotius rejected the usucaption of the Roman Law, yet adopted from the same law *immemorial* prescription ¹ for the Law of Nations. But whereas a good many writers ² still defend that standpoint, others ³ reject prescription altogether. Again, others ⁴ go beyond Grotius and his followers, and do not require possession from time *immemorial*, but teach that an undisturbed continuous possession can under certain conditions produce a title for the possessor, if the possession has lasted for some length of time.

This opinion would indeed seem to be correct, because

¹ See Grotius, ii. c. 4, §§ 1, 7, 9.

² See, for instance, Heffter, § 12; Martens, i. § 90.

³ G. F. Martens, § 71; Klüber, §§ 6 and 125; Holtzendorff, ii. p. 255; Ullmann, § 92.

⁴ Vattel, ii. § 147; Wheaton, § 165; Phillimore, i. § 259; Hall, § 36; Bluntschli, § 290; Pradier-Fodéré, ii. No. 825; Bonfils, No. 534, and many others.

it recognises theoretically what actually goes on in practice. There is no doubt that, in the practice of the members of the Family of Nations, a State is considered to be the lawful owner even of those parts of its territory of which originally it took possession wrongfully and unlawfully, provided that the possessor has been in undisturbed possession for such a length of time as is necessary to create the general conviction that the present condition of things is in conformity with international order. Such prescription cannot be compared with the usucaption of Roman Law, because the latter required *bona-fide* possession, whereas the Law of Nations recognises prescription both in cases where the State is in *bona-fide* possession and in cases where it is not. The basis of prescription in International Law is nothing else than general recognition¹ of a fact, however unlawful in its origin, on the part of the members of the Family of Nations. And prescription in International Law may therefore be defined as *the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order*. Thus, prescription in International Law has the same rational basis as prescription in Municipal Law—namely, the creation of stability of order.

§ 243. From the conception of prescription, as above defined, it becomes apparent that no general rule can be laid down as regards the length of time and other circumstances which are necessary to create a title by prescription. Everything depends upon the merits of

Prescription, how effected.

¹ This is pointed out with great lucidity by Heimbürger, pp. 151-155; he rejects, however, prescription as a mode of acquiring territory, maintaining that there is

a customary rule of International Law in existence, according to which recognition can make good originally wrongful possession.

the individual case. As long as other Powers keep up protests and claims, the actual exercise of sovereignty is not undisturbed, nor is there the required general conviction that the present condition of things is in conformity with international order. But after such protests and claims, if any, cease to be repeated, the actual possession ceases to be disturbed, and thus under certain circumstances matters may gradually ripen into that condition which is in conformity with international order. The question, at what time and under what circumstances such a condition of things arises, is not one of law, but of fact. When, to give an example, a State which originally held an island *mala fide* under a title by occupation, knowing well that this land had already been occupied by another State, has succeeded in keeping up its possession undisturbed for so long a time that the former possessor has ceased to protest, and has silently dropped the claim, the conviction will be prevalent among the members of the Family of Nations that the present condition of things is in conformity with international order. Or, to give another example, when an incorrectly drawn boundary line, which wrongly allots to one of the States concerned a tract of territory, has for a long time been regarded as correct, the conviction will prevail that the present condition of things is in conformity with international order, even if afterwards the wronged State raises a protest, and demands that the boundary line should be redrawn.¹ These examples show why a certain number of years ²

¹ See *Maryland v. West Virginia*, (1909) 217 U.S. 22, where it was held that a boundary line which had been for a century regarded as correct should be maintained, although afterwards alleged to be incorrect. The court came to this conclusion recognising prescription as conferring title.

² Vattel (ii. § 151) suggests that

the members of the Family of Nations should enter into an agreement stipulating the number of years necessary for prescription, and David Dudley Field proposes the following rule (52) in his *Outlines of an International Code*: 'The uninterrupted possession of territory or other property for fifty years by a nation excludes the claim of every other nation.'

cannot, once for all, be fixed to create the title by prescription. There are indeed immeasurable and imponderable circumstances and influences besides the mere lapse of time¹ at work to create the conviction that in the interest of stability of order the present possessor should be considered the rightful owner of a territory. And these circumstances and influences, which are of a political and historical character, differ so much in the different cases that the length of time necessary for prescription must likewise differ.

XVIII

LOSS OF STATE TERRITORY

Grotius, ii. c. 9—Hall, § 34—Phillimore, i. §§ 284-295—Moore, i. §§ 89 and 90—Hershey, Nos. 188-190—Holtzendorff in *Holtzendorff*, ii. pp. 274-276—Gareis, § 70—Liszt, § 10—Ullmann, § 100—Pradier-Fodéré, ii. Nos. 850-852—Bonfils, No. 544—Rivier, i. § 13—Fiore, ii. No. 865—Martens, i. § 92.

§ 244. To the five modes of acquiring sovereignty over territory correspond five modes of losing it—namely, cession, dereliction, operation of nature, subjugation, prescription. But there is a sixth mode of losing territory—namely, revolt. No special details are necessary with regard to loss of territory through subjugation, prescription, and cession, except that it is of some importance to repeat here that the historical cases of pledging, leasing, and giving territory to another State to administer are in fact, although not in strict law, nothing else than cessions² of territory. But operation of nature, revolt, and dereliction must be specially discussed.

Six Modes
of losing
State
Territory.

¹ Heffter's (§ 12) dictum, 'Hundert Jahre Unrecht ist noch kein Tag Recht,' is met by the fact that it is not the operation of time alone,

but the co-operation of other circumstances and influences which creates the title by prescription.

² See above, §§ 171 and 216.

Operation
of Nature.

§ 245. Operation of nature as a mode of losing territory corresponds to accretion as a mode of acquiring it. Just as through accretion a State may be enlarged, so it may be diminished through the disappearance of land and other operations of nature. And the loss of territory through operation of nature takes place *ipso facto* by such operation. Thus, if an island near the shore disappears through volcanic action, the extent of the maritime territorial belt of the respective littoral State is thereafter to be measured from the low-water mark of the shore of the continent, instead of from the shore of the former island. Thus, further, if through a piece of land being detached by the current of a river from one bank and carried over to the other bank, the river alters its course and now covers part of the land on the bank from which such piece became detached, the territory of one of the riparian States may be decreased through the boundary line being *ipso facto* transferred to the new middle or mid-channel of the river.

Revolt.

§ 246. Revolt followed by secession is a mode of losing territory to which no mode of acquisition corresponds.¹ But as history teaches, it has frequently been a cause of loss of territory. Thus the Netherlands fell away from Spain in 1579, Belgium from the Netherlands in 1830, the United States of America from Great Britain in 1776, Brazil from Portugal in 1822, the former Spanish South American States from Spain in 1810, Greece from Turkey in 1830, Cuba from Spain in 1898, Panama from Colombia in 1903. The question at what time a loss of territory through revolt is consummated cannot be answered once for all, since no hard and fast rule can be laid down regarding the time when a State

¹ The possible case where a province revolts, secedes from the mother country, and, after having successfully defended itself against the attempts of the latter to re-

conquer it, unites itself with the territory of another State, is a case of merger by cession of the whole territory.

which has broken off from another can be said to have established itself safely and permanently.¹ It may well happen that, although such a seceded State has already been recognised by a third Power, the mother country does not consider the territory to be lost, and succeeds in reconquering it.

§ 247. Dereliction as a mode of losing territory corresponds to occupation as a mode of acquiring it. Dereliction frees a territory from the sovereignty of the present owner-State. It is effected through the owner-State completely abandoning territory with the intention of withdrawing from it for ever, thus relinquishing sovereignty over it. Just as occupation² requires, first, the actual taking into possession (*corpus*) of territory, and, secondly, the intention (*animus*) of acquiring sovereignty over it, so dereliction requires, first, actual abandonment of a territory, and, secondly, the intention of giving up sovereignty over it. Actual abandonment alone does not involve dereliction as long as it must be presumed that the owner has the will and ability to retake possession of the territory. Thus, for instance, if the rising of natives forces a State to withdraw from a territory, such territory is not derelict as long as the former possessor is able, and makes efforts, to retake possession. It is only when a territory is really derelict that any State may acquire it through occupation.³ History knows of several such cases. But very often, when such occupation of derelict territory occurs, the former owner protests, and tries to prevent the new occupier from acquiring it. The cases of the island of Santa Lucia and of Delagoa Bay may be quoted as illustrations :

(a) In 1639 Santa Lucia, one of the Antilles Islands,

¹ The matter has, as will be remembered, been treated above (§ 74), in connection with recognition.

² See above, § 222.

³ See above, § 228.

Dereliction.

was occupied by England, but in the following year the English settlers were massacred by the natives. No attempt was made by England to retake the island, and France, considering it no man's land, took possession of it in 1650. In 1664 an English force under Lord Willoughby attacked the French, drove them into the mountains, and held the island until 1667, when the English withdrew, and the French returned from the mountains. No further step was made by England to retake the island, but she nevertheless asserted for many years to come that she had not abandoned it *sine spe redeundi*, and that, therefore, France in 1650 had no right to consider it no man's land. Finally, however, she resigned her claims by the Peace Treaty of Paris of 1763.¹

(b) In 1823 England occupied, in consequence of a so-called cession from native chiefs, a piece of territory at Delagoa Bay, which Portugal claimed as part of the territory owned by her at the bay, maintaining that the chiefs concerned were rebels. The dispute was not settled until 1875, when the case was submitted to the arbitration of the President of France. The award was given in favour of Portugal, since the interruption of the Portuguese occupation in 1823 was not to be considered as abandonment of a territory over which Portugal had exercised sovereignty for nearly three hundred years.²

¹ See Hall, § 34, and Moore, i. § 89.

award is printed in Moore, *Arbitrations*, v. p. 4984.

² See Hall, § 34. The text of the

CHAPTER II

THE OPEN SEA

I

RISE OF THE FREEDOM OF THE OPEN SEA

Grotius, ii. c. 2, § 3—Pufendorf, iv. c. 5, § 5—Vattel, i. §§ 279-286—Hall, § 40—Westlake, i. pp. 164-167—Phillimore, i. §§ 172-179—Taylor, §§ 242-246—Walker, *Science*, pp. 163-171—Wheaton, §§ 186-187—Hershey, No. 202—Hartmann, § 64—Heffter, § 73—Stoerk in *Holtzendorff*, ii. pp. 483-492—Bonfils, Nos. 572-576—Despagnet, No. 401—Pradier-Fodéré, ii. Nos. 871-874—Nys, ii. pp. 171-177—Mérignhac, ii. pp. 498-505—Calvo, i. §§ 347-352—Fiore, ii. Nos. 718-727—Martens, i. § 97—Perels, § 4—Azuni, *Diritto maritimo* (1796), i. c. 1. Article 3—Reddie, *Researches . . . in Maritime International Law*, i. (1844), pp. 79-111—Cauchy, *Le Droit maritime international considéré dans ses Origines*, 2 vols. (1862)—Nys, *Les Origines du Droit international* (1894), pp. 379-387—Castel, *Du Principe de la Liberté des Mers* (1900), pp. 1-15—Fulton, *The Sovereignty of the Seas* (1911) pp. 1-56—Stier-Sömlo, *Die Freiheit der Meere und das Völkerrecht* (1917), pp. 34-59.

§ 248. In antiquity and the first half of the Middle Ages, navigation on the open sea was free to everybody. According to Ulpianus,¹ the sea is open to everybody by nature, and, according to Celsus,² the sea, like the air, is common to all mankind. Since no Law of Nations in the modern sense of the term existed during antiquity and the greater part of the Middle Ages, no importance is to be attached to the pronouncement of Antoninus Pius, Roman Emperor from 138 to 161:—‘Being³ the Emperor of the world, I am consequently

Former Claims to Control over the Sea.

¹ L. 13, pr. D. viii. 4: mari quod natura omnibus patet.

munem usum omnibus hominibus ut aeris.

² L. 3, D. xliii. 8: Maris com-

³ L. 9, D. xiv. 2: ἐγὼ μὲν τοῦ κόσμου κύριος, ὁ δὲ νόμος τῆς θαλάσσης.

the law of the sea.' Nor is it of importance that the Emperors of the old German Empire, who were considered to be the successors of the Roman Emperors, styled themselves among other titles 'King of the Ocean.' Real claims to sovereignty over parts of the open sea begin, however, to be made in the second half of the Middle Ages. And there is no doubt whatever that, at the time when the modern Law of Nations gradually rose, it was the conviction of the States that they could extend their sovereignty over certain parts of the open sea. Thus the Republic of Venice was recognised as the sovereign over the Adriatic Sea, and the Republic of Genoa as the sovereign of the Ligurian Sea. Portugal claimed sovereignty over the whole of the Indian Ocean and of the Atlantic south of Morocco, and Spain over the Pacific and the Gulf of Mexico, both basing their claims on two Papal Bulls promulgated by Alexander VI. in 1493, which divided the New World between these Powers. Sweden and Denmark claimed sovereignty over the Baltic, and Great Britain over the Narrow Seas, the North Sea, and the Atlantic from the North Cape to Cape Finisterre.

These claims were more or less successfully asserted for several hundreds of years. They were favoured by a number of different circumstances, such as for instance the maintenance of an effective protection against piracy; and numerous examples can be adduced which show that they were more or less recognised. Thus Frederick III., Emperor of Germany, had in 1478 to ask the permission of Venice for a transportation of corn from Apulia through the Adriatic Sea.¹ Again, Great Britain, in the seventeenth century, compelled foreigners to take out an English licence for fishing in the North Sea; and when in 1636 the Dutch attempted to fish without such licence, they were attacked, and compelled to

¹ See Walker, *History*, i. p. 163.

pay £30,000 as the price for the indulgence.¹ Again, when Philip II. of Spain was in 1554 on his way to England to marry Queen Mary, the British admiral, who met him in the 'British Seas,' fired on his ship for flying the Spanish flag. And the King of Denmark, when returning from a visit to James I. in 1606, was forced by a British captain, who met him off the mouth of the Thames, to strike the Danish flag.

§ 249. Maritime sovereignty found expression in maritime ceremonials at least. Such State as claimed sovereignty over a part of the open sea required foreign vessels navigating that part to honour its flag² as a symbol of recognition of its sovereignty. So late as 1805 the British Admiralty Regulations contained an order³ to the effect that 'when any of His Majesty's ships shall meet with the ships of any foreign Power within His Majesty's seas (which extend to Cape Finisterre), it is expected that the said foreign ships do strike their topsail and take in their flag, in acknowledgment of His Majesty's sovereignty in those seas; and if any do resist, all flag officers and commanders are to use their utmost endeavours to compel them thereto, and not suffer any dishonour to be done to His Majesty.'

Practical
Express-
sion of
Claims to
Maritime
Sove-
reignty.

But apart from maritime ceremonials, maritime sovereignty also found expression in the levying of tolls from foreign ships, in the interdiction of fisheries to foreigners, and in the control, or even the prohibition, of foreign navigation. Thus Portugal and Spain attempted, after the discovery of America, to keep foreign vessels altogether out of the seas over which they claimed sovereignty. The magnitude of this claim created an opposition to the very existence of such rights. English, French, and Dutch explorers and traders navigated on

¹ This and the two following examples are quoted by Hall, § 40.

² See Fulton, *The Sovereignty of the Seas* (1911), pp. 39 and 204-208.

³ Quoted by Hall, § 40.

the Indian Ocean and the Pacific, in spite of the Spanish and Portuguese interdictions. And when, in 1580, the Spanish ambassador Mendoza lodged a complaint with Queen Elizabeth against Drake for having made his famous voyage to the Pacific, Elizabeth answered that vessels of all nations could navigate on the Pacific, since the use of the sea and the air is common to all, and that no title to the ocean can belong to any nation, since neither nature nor regard for the public use permit any possession of the ocean.¹

Grotius' Attack on Maritime Sovereignty.

§ 250. Queen Elizabeth's attitude was the germ out of which grew gradually the present freedom of the open sea. Twenty-nine years after her answer to Mendoza, in 1609, appeared Grotius' short treatise² *Mare liberum*. His intention was to show that the Dutch had a right of navigation and commerce with the Indies, in spite of the Portuguese interdictions. He contended that the sea cannot be State property, because it cannot really be taken into possession through occupation,³ and that consequently the sea is by nature free from the sovereignty of any State.⁴ The attack of Grotius was met by several authors of different nations. Gentilis defended Spanish and English claims in his *Advocatio Hispanica*,⁵ which appeared, after his death, in 1613. Likewise, in 1613, William Welwood defended the English claims in his book, *De Dominio Maris*. John

¹ See Walker, *History*, i. p. 161. It is obvious that this attitude of Queen Elizabeth was in no way the outcome of the conviction that really no State could claim sovereignty over a part of the open sea. For she herself did not think of dropping the British claims to sovereignty over the 'British Seas.' Her arguments against the Spanish claims were made in the interest of the growing commerce and navigation of England, and any one daring to apply the same arguments against England's claims would have incurred her royal displeasure.

² Its full title is: *Mare liberum seu de Jure quod Batavis competit ad indicana Commercia Dissertatio*, and it is now proved that this short treatise is only chapter 12 of another work of Grotius, *De Jure Praedae*, which was found in manuscript in 1864 and published in 1868. See above, § 53.

³ See below, § 259.

⁴ Grotius was by no means the first author who defended the freedom of the sea. See Nys, *Les Origines du Droit international*, pp. 381 and 382.

⁵ See Abbott in *A.J.*, x. (1916), pp. 737-748.

Selden wrote his *Mare clausum sive de Dominio Maris* in 1618, but it was not printed until 1635. Sir John Burroughs wrote in 1633 his book, *The Sovereignty of the British Seas proved by Records, History, and the Municipal Laws of this Kingdom*, but it was not published until 1651. In defence of the claims of the Republic of Venice, Paolo Sarpi published in 1676 his book *Del Dominio del Mare Adriatico*. The most important of these books defending maritime sovereignty is that of Selden. King Charles I., by whose command Selden's *Mare clausum* was printed in 1635, was so much impressed by it that, through his ambassador in the Netherlands, he complained of the audacity of Grotius and requested that the author of the *Mare liberum* should be punished.¹

The general opposition to the bold attack of Grotius on maritime sovereignty prevented his immediate victory. Too firmly established were the claims then recognised to sovereignty over certain parts of the open sea for the novel principle of the freedom of the sea to supplant them. Progress was made regarding one point only—namely, freedom of *navigation* of the sea. England had never pushed her claims so far as to attempt the prohibition of free navigation on the so-called British Seas. And although Venice succeeded in keeping up her control of navigation on the Adriatic till the middle of the seventeenth century, it may be said that in the second half of that century navigation on all parts of the open sea was practically free for vessels of all nations. But with regard to other points, claims to maritime sovereignty continued to be kept up. Thus the Netherlands had by Article 4 of the Treaty of Westminster, 1674, to acknowledge that their vessels had to salute the British flag within the 'British Seas' as a recognition of British maritime sovereignty.²

¹ See Phillimore, i. § 182.

² See Hall, § 40, p. 149, n. 4.

Gradual
Recogni-
tion of the
Freedom
of the
Open Sea.

§ 251. In spite of opposition, the work of Grotius was not to be undone. All prominent writers of the eighteenth century took up again the case of the freedom of the open sea, making a distinction between the maritime belt which is to be considered under the sway of the littoral States, and the high seas, which are under no State's sovereignty. The leading author was Bynkershoek, whose standard work, *De Dominio Maris*, appeared in 1702. Vattel, G. F. de Martens, Azuni, and others followed the lead. And although Great Britain upheld her claim to the salute due to her flag within the 'British Seas' throughout the eighteenth and at the beginning of the nineteenth centuries, the principle of the freedom of the open sea became more and more vigorous with the growth of the navies of other States; and at the end of the first quarter of the nineteenth century it became universally recognised in theory and practice. Great Britain silently dropped her claim to the salute, and with it her claim to maritime sovereignty, and she became now a champion of the freedom of the open sea. When, in 1821, Russia, which then still owned Alaska in North America, attempted to prohibit all foreign ships from approaching within one hundred Italian miles of the shore of Alaska, Great Britain and the United States protested in the interest of the freedom of the open sea, and Russia dropped her claims in conventions concluded with the protesting Powers in 1824 and 1825. Moreover, when, after Russia had sold Alaska in 1867 to the United States, the latter made regulations regarding the killing of seals within Behring Sea, claiming thereby jurisdiction and control over a part of the open sea, a conflict arose in 1886 with Great Britain, which was settled by arbitration¹ in 1893 in favour of the freedom of the open sea.

¹ See below, § 284.

II

CONCEPTION OF THE OPEN SEA

Field, Article 53—Westlake, i. p. 164—Moore, ii. § 308—Rivier, i. pp. 234-235—Pradier-Fodéré, ii. No. 868—Ullmann, § 101—Stoerk in *Holtzendorff*, ii. p. 483.

§ 252. The open sea or the high seas ¹ is the coherent body of salt water all over the greater part of the globe, with the exception of the maritime belt and the territorial straits, gulfs, and bays, which are parts of the sea, but not parts of the open sea. Wherever there is a salt-water sea on the globe, it is part of the open sea, provided it is not isolated from, but coherent with, the general body of salt water extending over the globe, and provided that the salt-water approach to it is navigable and open to vessels of all nations. The enclosure of a sea by the land of one and the same State does not matter, provided such a navigable connection of salt water as is open to vessels of all nations exists between such sea and the general body of salt water, even if that navigable connection itself be part of the territory of one or more littoral States. Whereas, therefore, in 1914 ² the Dead Sea was Turkish and the Aral Sea was Russian territory, the Sea of Marmora was part of the open sea, although surrounded by Turkish land, and although the Bosphorus and the Dardanelles were Turkish territorial straits, because these were open to merchantmen of all nations.³ On the other hand, the Sea of Azoff was not part of the open sea, but Russian territory, although there existed a navigable connection between it and the Black Sea. The reason was that this connection, the

Discrimination between Open Sea and Territorial Waters.

¹ Field defines in Article 53: 'The high seas are the ocean, and all connecting arms and bays or other extensions thereof, not within the territorial limits of any nation whatever.'

² The Turkish settlement was still under consideration when this volume went to press. No progress had been made with the settlement of Russia.

³ See above, § 197.

Strait of Kertch, was not according to the Law of Nations open to vessels of all nations, since the Sea of Azoff is less a sea than a mere gulf of the Black Sea.¹ The character of the Inland Sea of Japan² is doubtful. Its three entrances, which are less than three miles wide, are indeed in practice open to merchantmen of all nations, but it is not known whether this practice is based upon comity only, or upon a customary rule of International Law. Moreover, geographically considered, this sea is more like a vast bay. The claim of Japan to its territorial character would therefore, perhaps, not be disputed by other States.

Clear Instances of Parts of the Open Sea.

§ 253. It is not necessary or possible to particularise every portion of the open sea. It is sufficient to give instances which clearly indicate its extent. To the open sea belong, of course, all the so-called oceans—namely, the Atlantic, Pacific, Indian, Arctic, and Antarctic. But the branches of the oceans, which go under special names, and, further, the branches of these branches, which again go under special names, belong likewise to the open sea. Examples of these branches are: the North Sea, the English Channel, and the Irish Sea; the Baltic Sea, the Gulf of Bothnia, the Gulf of Finland, the Kara Sea,³ and the White Sea; the Mediterranean and the Ligurian, Tyrrhenian, Adriatic, Ionian, Marmora, and Black Seas; the Gulf of Guinea; the Mozambique Channel; the Arabian Sea and the Red Sea; the Bay of Bengal, the China Sea, the Gulf of Siam, and the Gulf of Tonking; the Eastern Sea, the Yellow Sea, and the Sea of Okhotsk; the Behring Sea; the Gulf of Mexico and the Caribbean Sea; Baffin's Bay.

¹ So say Rivier, i. p. 235, and Martens, i. § 97; but Stoerk in *Holtzendorff*, ii. p. 513, declared that the Sea of Azoff was part of the open sea.

² See *The Imperial Japanese Government v. Peninsular and Orien-*

tal Steam Navigation Co., [1895] A.C. 644, and Piggott, *Nationality*, p. 29.

³ The assertion of some Russian publicists that the Kara Sea is Russian territory is refuted by Martens, i. § 97.

It will be remembered that it is doubtful as regards many gulfs and bays whether they belong to the open sea or are territorial.¹

III

THE FREEDOM OF THE OPEN SEA

Hall, § 75—Westlake, i. pp. 164-170—Lawrence, § 100—Twiss, i. §§ 172-173—Moore, ii. §§ 309-310—Taylor, § 242—Wheaton, § 187—Hershey, Nos. 203-206—Bluntschli, §§ 304-308—Heffter, § 74—Stoerk in *Holtzendorff*, ii. pp. 483-498—Ullmann, § 101—Bonfils, Nos. 572-577—Pradier-Fodéré, ii. Nos. 874-881—Rivier, i. § 17—Nys, ii. pp. 178-205—Calvo, i. § 346—Fiore, ii. Nos. 724, 727, and *Code*, Nos. 933-935—Martens, i. § 97—Perels, § 4—Testa, pp. 63-66—Ortolan, *Diplomatie de la Mer* (1856), i. pp. 119-149—De Burgh, *Elements of Maritime International Law* (1868), pp. 1-24—Castel, *Du Principe de la Liberté des Mers* (1900), pp. 37-80.

§ 254. The term 'Freedom of the Open Sea' indicates the rule of the Law of Nations that the open sea is not, and never can be, under the sovereignty of any State whatever. Since, therefore, the open sea is not the territory of any State, no State has as a rule a right to exercise its legislation, administration, jurisdiction,² or police³ over parts of the open sea. Since, further, the open sea can never be under the sovereignty of any State, no State has a right to acquire parts of the open sea through occupation,⁴ for, as far as the acquisition of territory is concerned, the open sea is what Roman

Meaning of the Term 'Freedom of the Open Sea.'

¹ See above, § 191.

² As regards jurisdiction in cases of collision and salvage on the open sea, see below, §§ 265 and 271.

³ See, however, above, § 190, concerning the zone for Revenue and Sanitary Laws.

⁴ Following Grotius (ii. c. 3, § 13) and Bynkershoek (*De Dominio Maris*, c. 3), some writers (for instance, Phillimore, i. § 203) maintain that

any part of the open sea covered for the time by a vessel is by occupation to be considered as the temporary territory of the vessel's flag State. And some French writers go even beyond that and claim a certain zone round the respective vessel as temporary territory of the flag State. But this is an absolutely superfluous fiction. (See Stoerk in *Holtzendorff*, ii. p. 494; Rivier, i. p. 238; Perels, pp. 37-39.)

Law calls *res extra commercium*.¹ But although the open sea is not the territory of any State, it is nevertheless an object of the Law of Nations. The mere fact that there is a rule exempting the open sea from the sovereignty of any State whatever² shows this. But there are other reasons. For if the Law of Nations were to content itself with the rule which excludes the open sea from possible State property, the consequence would be a condition of lawlessness and anarchy on the open sea. To obviate such lawlessness, customary International Law contains some rules which guarantee a certain legal order on the open sea, in spite of the fact that it is not the territory of any State; and important international conventions have been concluded with the same object.

Legal
Provisions
for the
Open Sea.

§ 255. Apart from the rules contained in the conventions regarding salvage, assistance, collisions and safety of life at sea, which are discussed below,³ this legal order is created through the co-operation of the Law of Nations and the Municipal Laws of such States as possess a maritime flag. The following rules of the Law of Nations are universally recognised, namely: first, that every State which has a maritime flag must lay down rules according to which vessels can claim to sail under its flag, and must furnish such vessels with some official voucher authorising them to make use of its flag; secondly, that every State has a right to punish all such foreign vessels as sail under its flag without being authorised to do so; thirdly, that all vessels with their persons and goods are, whilst on the open sea, considered under the sway of the flag State; fourthly, that every State has a right to punish piracy

¹ But the subsoil of the bed of the open sea can, through driving mines and piercing tunnels from the coast, be acquired by a littoral State. See above, § 221, and below, §§ 287c and 287d.

² The assertion of Stier-Somlo, *op. cit.*, p. 59, that this rule is not one of customary International Law, but only a rule of comity, is absolutely unfounded.

³ See §§ 265, 271, 594.

on the open sea even if committed by foreigners, and that, with a view to the extinction of piracy, men-of-war of all nations can require all suspect vessels to show their flag.

These customary rules of International Law are, so to say, supplemented by Municipal Laws of the maritime States comprising provisions, first, regarding the conditions to be fulfilled by vessels for the purpose of being authorised to sail under their flags; secondly, regarding the details of jurisdiction over persons and goods on board vessels sailing under their flags; thirdly, concerning the order on board ship and the relations between the master, the crew, and the passengers; fourthly, concerning punishment of ships sailing without authorisation under their flags.

§ 256. Although the open sea is free, and is not the territory of any State, it may nevertheless, in its whole extent, become the theatre of war, since the region of war is not only the territories of the belligerents, but likewise the open sea, provided that one of the belligerents at least is a Power with a maritime flag.¹ Men-of-war of the belligerents may fight a battle in any part of the open sea where they meet, and they may capture all enemy merchantmen they meet on the open sea. And, further, the jurisdiction and police of the belligerents become, through the outbreak of war, in so far extended over vessels of other States, that belligerent men-of-war may now visit, search, and capture neutral merchantmen for breach of blockade, contraband, and the like.

Freedom
of the
Open Sea
and War.

However, certain parts of the open sea can become neutralised, and thereby be excluded from the region of war. Thus the Black Sea became neutralised in 1856 through Article 11 of the Peace Treaty of Paris

¹ Concerning the distinction between theatre and region of war, see below, vol. ii. §70.

stipulating: 'La Mer Noire est neutralisée: ouverte à la marine marchande de toutes les nations, ses eaux et ses ports sont formellement et à perpétuité interdits au pavillon de guerre, soit des puissances riveraines, soit de toute autre puissance.' Yet this neutralisation of the Black Sea was abolished¹ in 1871 by Article 1 of the Treaty of London, and no other part of the open sea is at present neutralised.

Naviga-
tion and
Cere-
monials
on the
Open Sea.

§ 257. The freedom of the open sea involves perfect freedom of navigation for vessels of all nations, whether men-of-war, other public vessels, or merchantmen. It involves, further, absence of compulsory maritime ceremonials on the open sea. According to the Law of Nations, no rights whatever of salute exist between vessels meeting on the open sea. All so-called maritime ceremonials on the open sea² are a matter, either of courtesy and usage, or of special conventions and Municipal Laws of those States under whose flags vessels sail. In particular, no State has any right to require a salute from foreign merchantmen for its men-of-war.³

The freedom of the open sea involves likewise freedom of inoffensive passage⁴ through the maritime belt for merchantmen of all nations, and also for men-of-war of all nations, in so far as the part of the maritime belt concerned forms a part of the highways for international traffic. Without such freedom of passage, navigation on the open sea by vessels of all nations would be a physical impossibility.

Claim of
States to
Maritime
Flag.

§ 258. Since no State can exercise protection over vessels that do not sail under its flag, and since every vessel must, in the interest of the order and safety of the open sea, sail under the flag of a State, the question

¹ See above, § 181.

² But not within the maritime belt or other territorial waters. See above, §§ 122 and 187.

³ That men-of-war can on the open sea ask suspicious foreign

merchantmen to show their flags has nothing to do with ceremonials, but with the supervision of the open sea in the interest of its safety. See below, § 266.

⁴ See above, § 188.

was discussed before the World War, whether, not only maritime States, but also States with no sea-coasts could claim a maritime flag. At that time no State without a seaboard actually had a maritime flag, and all vessels belonging to its subjects sailed under the flag of a maritime State. The question was discussed, in particular, in Switzerland. In 1864, 1874, 1889 and 1891, Swiss merchants in foreign ports applied to the Swiss Bundesrath for permission for their vessels to sail under the Swiss flag; but the Swiss Government refused to have a maritime flag,¹ though it had no doubt that it had a claim to such flag, because it was aware of the difficulties arising from the fact that, as Switzerland had no seaports of her own, vessels sailing under her flag would in many points have to depend upon the goodwill of the maritime Powers.²

The author did not doubt that the freedom of the open sea involved a claim of any State to a maritime flag;³ and since the World War, by the Treaties of Peace,⁴ the High Contracting Parties have agreed to recognise the flag flown by the vessels of an Allied or Associated Power having no sea-coast, but registered at a place within its territory serving as a port of registry.

Such States as have a maritime flag as a rule have a war flag different from their commercial flag; some States, however, have one and the same flag for both their navy and their mercantile marine. But it must be mentioned that a State can by an international convention be restricted to a mercantile flag only, such State being prevented from having a navy. This was

¹ See Huber, *Die rechtlichen Verhältnisse einer Schweizerischen Meeres-schiffahrt unter Schweizer Flagge* (1918), pp. 3-5.

² The question is discussed by Calvo, i. § 427; Twiss, i. §§ 197 and 198; Westlake, i. p. 169; and

thoroughly by Huber, *op. cit.*, pp. 5-21.

³ See Huber, *op. cit.*, pp. 5-11, who agreed, and Westlake, i. p. 169, who dissented.

⁴ e.g. Treaty of Peace with Germany, Article 273.

formerly the position of Montenegro¹ according to Article 29 of the Treaty of Berlin of 1878.

The Dominions of Canada, Australia, and New Zealand have a maritime flag which is a modification of the British flag.²

Rationale
for the
Freedom
of the
Open Sea.

§ 259. Grotius and many writers who follow³ him establish two facts as the reason for the freedom of the open sea. They maintain, first, that a part of the open sea could not be effectively occupied by a navy, and could not therefore be brought under the actual sway of any State; secondly, that nature does not give a right to anybody to appropriate such things as may inoffensively be used by everybody and are inexhaustible, and, therefore, sufficient for all.⁴ The last argument has nowadays hardly any value, especially for those who have freed themselves from the fanciful rules of the so-called Law of Nature. And the first argument is now without basis in face of the development of the modern navies, since the number of public vessels which the different States possess at present would enable many a State to occupy effectively one part or another of the open sea. The real reason for the freedom of the open sea is represented in the motive which led to the attack against maritime sovereignty, and in the purpose for which such attack was made—namely, the freedom of communication, and especially commerce, between the States which are severed by the sea. The sea being an international highway which connects distant lands, it is the common conviction that it should not be under the sway of any State whatever. It is in

¹ See above, § 127, but it was doubtful before the World War whether this restriction was still in existence, since Article 29 was, after the annexation of Bosnia and Herzegovina by Austria in 1908, modified by the Powers, so that the port of Antivari and the other Montenegrin

waters were no longer closed to men-of-war of all nations. See *R.G.*, xvii. (1910), pp. 173-176.

² See above, § 94a, and Ewart in *A.J.*, vii. (1914), pp. 780-783.

³ See, for instance, Twiss, i. § 172, and Westlake, i. p. 160.

⁴ See Grotius, ii. c. 2, § 3.

the interest of free intercourse ¹ between the States that the principle of the freedom of the open sea has become universally recognised and will always be upheld.²

IV

JURISDICTION ON THE OPEN SEA

Vattel, ii. § 80—Hall, § 45—Westlake, i. pp. 170-180—Lawrence, § 100—Halleck, p. 438—Taylor, §§ 262-267—Walker, § 20—Hershey, Nos. 207-210—Wheaton, § 106—Moore, ii. §§ 309-310—Bluntschli, §§ 317-352—Heffter, §§ 78-80—Stoerk in *Holtzendorff*, ii. pp. 518-550—Liszt, § 26—Bonfil, Nos. 578-580, 597-613—Despagnet, Nos. 422-430—Mérignhac, ii. pp. 536-553—Pradier-Fodéré, v. Nos. 2376-2470—Rivier, i. § 18—Nys, ii. pp. 178-215—Calvo, i. §§ 385-473—Fiore, ii. Nos. 730-742, and *Code*, Nos. 1006-1032—Martens, ii. §§ 55-56—Perels, § 12—Testa, pp. 98-112—Ortolan, *Diplomatie de la Mer* (1856), i. 254-325—Hall, *Foreign Powers and Jurisdiction of the British Crown* (1894), §§ 106-109.

§ 260. Jurisdiction on the open sea is in the main connected with the maritime flag under which vessels sail. This is the consequence of the fact stated above ³ that a certain legal order is created on the open sea through the co-operation of rules of the Law of Nations with rules of the Municipal Laws of such States as possess a maritime flag. But two points must be emphasised. The one is that this jurisdiction is not jurisdiction over the open sea as such, but only over vessels, persons, and goods on the open sea. And the other is that jurisdiction on the open sea is, although mainly, not exclusively connected with the flag under which vessels sail, because men-of-war of all nations have, as will be seen,⁴ certain powers over merchantmen of all nations. The points which must therefore be here discussed singly are: the claim of vessels to sail under

Jurisdiction on the Open Sea mainly connected with Flag.

¹ See above, § 142.

² Connected with the reason for the freedom of the open sea is the merely theoretical question whether the vessels of a State could, through an international treaty, be prevented from navigating on the whole or on

certain parts of the open sea. See Pradier-Fodéré, ii. Nos. 881-885, where this point is exhaustively discussed.

³ See above, § 255.

⁴ See below, § 266.

a certain flag, ship papers, the names of vessels, the connection of vessels with the territory of the flag State, the safety of traffic on the open sea, the powers of men-of-war over merchantmen of all nations, and, lastly, shipwreck.

Claim of
Vessels to
sail under
a certain
Flag.

§ 261. The Law of Nations does not include any rules regarding the claim of vessels to sail under a certain maritime flag, but imposes the duty upon every State having a maritime flag to stipulate by its own Municipal Laws the conditions to be fulfilled by those vessels which wish to sail under its flag. In the interest of order on the open sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatever, for the freedom of navigation on the open sea is freedom for such vessels only as sail under the flag of a State. But a State is absolutely independent in framing the rules concerning the claim of vessels to its flag. It can in particular authorise such vessels to sail under its flag as are the property of foreign subjects; but such foreign vessels sailing under its flag fall thereby under its jurisdiction. The different States have made different rules concerning the sailing of vessels under their flags.¹ Some, as Great Britain² and Germany,³ allow only such vessels to sail under their flags as are the exclusive property of their citizens or of corporations established on their territory. Others, as Argentina, allow vessels which are the property of foreigners. Others again, as France,³ allow vessels which are only in part the property of French citizens.⁴

¹ See Calvo, i. §§ 393-423, where the respective Municipal Laws of most countries are given.

² See § 1 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), and §§ 51 and 80 of the Merchant Shipping Act, 1906 (6 Edw. VII. c. 48).

³ At any rate, before the World War.

⁴ The Institute of International Law adopted, at its meeting at Venice—see *Annuaire*, xv. (1896), p. 201—in 1896, a body of ten rules concerning the sailing of merchantmen under the maritime flag of a State under the heading: 'Règles relatives à l'Usage du Pavillon national pour les Navires de Commerce.'

But no State can allow a vessel to sail under its flag which already sails under the flag of another State. A vessel sailing under the flags of two different States, like a vessel not sailing under the flag of any State, does not enjoy any protection whatever. Nor is protection enjoyed by a vessel sailing under the flag of a State which has no maritime flag.¹ Vessels belonging to subjects of such a State must obtain authority to sail under the flag of another State, if they wish to enjoy protection on the open sea.¹ And any vessel, although the property of foreigners, which sails without authority under the flag of a State, may be captured by the men-of-war of such State, prosecuted, punished, and confiscated.²

§ 262. All States with a maritime flag are by the Law of Nations obliged to make private vessels sailing under their flags carry on board so-called ship papers, which serve the purpose of identification on the open sea. But neither the number, nor the kind, of such papers is prescribed by International Law, and the Municipal Laws of the different States differ much on this subject.³ They do, however, agree to the following papers :

(1) An official voucher authorising the vessel to sail under its flag. This voucher consists of a *Certificate of Registry*, in case the flag State possesses, like Great Britain and Germany for instance, a register of its mercantile marine ; in other cases the voucher consists of a *Passport*, *Sea-letter*, *Sea-brief*, or of some other document serving the purpose of showing the vessel's nationality.

(2) *The Muster Roll*.—This is a list of all the members of the crew, their nationality, and the like.

¹ But see above, § 258.

² See the case of *The Steamship Maori King*, [1909] A.C. 562, and §§ 69 and 76 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

³ See Holland, *Manual of Naval Prize Law*, §§ 178-194, where the papers required by the different maritime States are enumerated.

(3) *The Log Book*.—This is a full record of the voyage, with all nautical details.

(4) *The Manifest of Cargo*.—This is a list of the cargo of a vessel, with details concerning the number and the marking of each package, the names of the shippers and the consignees, and the like.

(5) *The Bills of Lading*.—These are duplicates of the documents which the master of the vessel hands over to the shipper of the goods on shipment.

(6) If the vessel is chartered, the *Charter Party*. This is the contract between the owner of the ship, who lets it wholly or in part, and the charterer, who hires it.

Names of
Vessels.

§ 263. Every State must register the names of all private vessels sailing under its flag, and it must make them bear their names visibly, so that every vessel may be identified from a distance. No vessel must be allowed to change her name without permission and fresh registration.¹

Terri-
torial
Quality of
Vessels on
the Open
Sea.

§ 264. It is a customary rule of the Law of Nations that men-of-war and other public vessels of any State are, whilst on the open sea as well as in foreign territorial waters, in every point considered as though they were floating parts of their home States.² Private vessels are only considered as though they were floating portions of the flag State in so far as they remain whilst on the open sea in principle under the exclusive jurisdiction of the flag State. Thus the birth of a child,³ a will or business contract made, or a crime⁴ committed on board ship, and the like, are considered as happening on the territory, and therefore under the territorial

¹ As regards Great Britain, see §§ 47 and 48 of the Merchant Shipping Act, 1894, and §§ 50 and 53 of the Merchant Shipping Act, 1906.

² See above, § 172, and below, §§ 447-451.

³ *Marshall v. Murgatroyd*, (1870) L.R. 6 Q.B. 31; and the British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. v. c. 17), § 1(1)c.

⁴ See Jordan in *R.I.*, 2nd Ser. x. (1908), pp. 341-362 and 481-500; and *R. v. Lesley*, (1860) Bell 220.

supremacy of the flag¹ State. But although they appear in this respect as though they were, private vessels are in fact not floating portions of the flag State. For in time of war belligerent men-of-war can visit, search, and capture neutral private vessels on the open sea for breach of blockade, contraband, and the like, and in time of peace men-of-war of all nations have certain powers² over merchantmen of all nations.

§ 265. Until 1910 no rules of the Law of Nations existed for the purpose of preventing collisions, saving lives after collisions, and the like ; but every State possessing a maritime flag had enacted laws concerning signalling, piloting, courses, collisions, and the like, which were applicable to vessels sailing under its flag on the open sea. Although every State could then legislate on these matters independently, there was a tendency during the second half of the nineteenth century to follow the lead given by Great Britain in the Merchant Shipping Amendment Act of 1862, with its 'Regulations for preventing Collisions at Sea,' and the Merchant Shipping Acts of 1873 and 1894. Moreover, the *Commercial Code of Signals for the Use of all Nations*, published by Great Britain in 1857, was adopted by all maritime States. In 1889 a conference of eighteen maritime States took place at Washington, which recommended a body of rules for preventing collisions at sea to be adopted by each State,³ and a revision of the *Code of Signals*. These regulations were revised in 1890 in England, and,⁴ after some direct negotiations between the Governments, most maritime States made

Safety of
Traffic on
the Open
Sea.

¹ Since, however, individuals abroad remain under the personal supremacy of their home State, nothing can prevent a State from legislating as regards such of its citizens as sail on the open sea on board a foreign vessel.

² See below, § 266. The question of the territoriality of vessels is ably discussed by Hall, §§ 76-79.

³ See Martens, *N.R.G.*, 2nd Ser. xvi. p. 416.

⁴ See Martens, *N.R.G.*, 2nd Ser. xxii. p. 113.

corresponding regulations. A new and revised edition of the *International Code of Signals* was published by the British Board of Trade, in conformity with arrangements with other maritime Powers, in 1900, and was in general use¹ before the World War. Early in 1920, a committee was appointed by the British Government to prepare a new version.

But whereas before 1910 there were no rules of International Law on these matters, in that year, at a conference held at Brussels, to which all the maritime States of Europe, the United States of America, and most of the South American States sent representatives, two conventions were signed on September 23, one 'for the unification of certain rules of law with respect to collisions between vessels,' and the other 'for the unification of certain rules of law respecting assistance and salvage at sea.'² To carry out these two conventions the Maritime Conventions Act³ was passed in 1911. Moreover, as a result of the disaster to the liner *Titanic*, an international conference met in London in 1913 to draw up a convention for the safety of life at sea. The convention was signed on January 20, 1914, was to be ratified not later than the end of that year, and to come into operation on July 1, 1915. But owing to the World War no further steps were taken with regard to it, and the coming into force of the Merchant Shipping (Convention) Act, 1914,⁴ which was passed in Great Britain to give effect to the convention, has, in consequence, been postponed from time to time.⁵

¹ This matter of collision at sea, as it stood in 1899, is exhaustively treated by Prien, *Der Zusammenstoss von Schiffen nach den Gesetzen des Erdballs* (2nd ed. 1899). See also Smith, *The Law Relating to the Rule of the Road at Sea* (1910).

² Misc., No. 5 (1911), Cd. 5558; Treaty Ser. (1913), No. 4; Martens, *N.R.G.*, 3rd Ser. vii. p. 711.

³ 1 & 2 Geo. v. c. 57. As to the second of these conventions, see below, § 271.

⁴ 4 & 5 Geo. v. c. 50. The convention is printed as a schedule to the Act. See also Wheeler in *A.J.*, viii. (1914), pp. 758-768.

⁵ *London Gazette*, December 9, 1919.

But although certain rules of law which are to be applied in actions relating to collisions at sea have been settled by the first of the conventions just mentioned,¹ the question as to what courts have jurisdiction in such actions is not at all settled.² That the damaged innocent vessel can bring an action against the guilty ship in the courts of the latter's flag State is beyond doubt, since jurisdiction on the open sea follows the flag. If the rule that all vessels while on the open sea are considered under the sway of their flag State were one without exception, no other State could claim jurisdiction in cases of collision. But in fact maritime States³ do claim jurisdiction over vessels flying other flags, though their practice is not uniform. Thus, for instance, France⁴ claims jurisdiction if the damaged ship is French, although the guilty ship may be foreign, and also if both ships are foreign in case both consent, or for urgent measures having a provisional character, or in case France is a place of payment. Thus, further, Italy⁵ claims jurisdiction, even if both ships are foreign, in case an Italian port is the port nearest to the collision, or in case the damaged ship was forced by the collision to remain in an Italian port. Great Britain goes farthest, for the Admiralty Court claims jurisdiction provided the guilty ship is in a British port at the time the action for damages is brought, even if the collision took place between two

¹ Both the Brussels Conventions of 1910 are in the list of multilateral treaties of an economic or technical character which, according to Article 282 of the Treaty of Peace with Germany, 'shall alone be applied as between Germany and those of the Allied and Associated Powers party thereto.' See below, § 581b.

² See Phillimore, iv. § 815; Calvo, i. § 444; Pradier-Fodéré, v. Nos. 2362-2374; Bar, *Private International Law* (2nd ed. translated by Gillespie), pp. 720 and 928; Dicey, *Conflict of*

Laws (2nd ed.), pp. 650-652 and 790; Foote, *Private International Jurisprudence* (3rd ed.), pp. 486 and 495; Westlake, *Private International Law* (4th ed.), pp. 266-269; Marsden, *The Law of Collisions at Sea* (6th ed. 1910); Williams and Bruce, *Treatise on the Jurisdiction of English Courts in Admiralty Actions* (3rd ed. 1902); Halsbury, *The Laws of England: Collisions*, vol. xxvi. p. 359.

³ See above, § 146.

⁴ See Pradier-Fodéré, v. No. 2363.

⁵ See Pradier-Fodéré, v. No. 2364.

nised rule that men-of-war of every State may seize, and bring to a port of their own for punishment, any foreign vessel sailing under the flag of such State without authority.¹ Accordingly, Great Britain has, by section 69 of the Merchant Shipping Act, 1894, enacted : ' If a person uses the British flag and assumes the British national character on board a ship owned in whole or in part by any persons not qualified to own a British ship, for the purpose of making the ship appear a British ship, the ship shall be subject to forfeiture under this Act, unless the assumption has been made for the purpose of escaping capture by an enemy or by a foreign ship of war in the exercise of some belligerent right.'

How Veri-
fication of
Flag is
effected.

§ 267. A man-of-war which meets a suspicious merchantman not showing her colours and wishes to verify them, hoists her own flag, and fires a blank cartridge. This is a signal for the other vessel to hoist her flag in reply. If she takes no notice of the signal, the man-of-war fires a shot across her bows. If the suspicious vessel, in spite of this warning, still declines to hoist her flag, the suspicion becomes so grave that the man-of-war may compel her to bring to for the purpose of visiting her, and thereby verifying her nationality.

How Visit
is effected.

§ 268. The intention to visit may be communicated to a merchantman either by hailing, or by the 'informing gun'—that is, by firing either one or two blank cartridges. If the vessel takes no notice of this communication, a shot may be fired across her bows as a signal to bring to, and, if this also has no effect, force may be resorted to. After the vessel has been brought to, either an officer is sent on board for the purpose of inspecting her papers, or her master is ordered to bring his ship papers for inspection on board the man-of-war.

¹ Except as a ruse, in time of war, to escape capture by a belligerent man-of-war.

If the inspection proves the papers to be in order, a memorandum of the visit is made in the log book, and the vessel is allowed to proceed on her course.

§ 269. Search is naturally a measure which visit must always precede. It is because the visit has given no satisfaction that search is instituted. Search is effected by an officer and some of the crew of the man-of-war, the master and crew of the vessel to be searched not being compelled to render any assistance whatever, except to open locked cupboards and the like. The search must take place in an orderly way, and no damage must be done to the cargo. If the search proves everything to be in order, the searching party must carefully replace everything removed, a memorandum of the search is to be made in the log book, and the searched vessel is to be allowed to proceed on her course.

How
Search is
effected.

§ 270. Arrest of a vessel takes place either after visit and search have shown her liable thereto, or after she has committed some act which is sufficient in itself to justify her seizure. Arrest is effected through the commander of the arresting man-of-war appointing one of her officers and a part of her crew to take charge of the arrested vessel. This officer is responsible for the vessel, and for her cargo, which must be kept safe and intact. The arrested vessel, either accompanied by the arresting vessel or not, must be brought to such harbour as is determined by the cause of the arrest. Thus, neutral or enemy ships seized in time of war are always ¹ to be brought into a harbour of the flag State of the captor. And the same is the case in time of peace, when a vessel is seized because her flag cannot be verified, or because she was sailing under no flag at all. On the other hand, when a fishing vessel or a bumboat is arrested in the North Sea, she is always to be brought into a harbour

How
Arrest is
effected.

¹ Except in the case of distress or unseaworthiness; see below, vol. ii. § 193.

of her flag State and handed over to the authorities there.¹

Ship-
wreck
and Dis-
tress on
the Open
Sea.

§ 271. Goods and persons shipwrecked on the open sea do not thereby lose the protection of the flag State of the shipwrecked vessel. Even before 1910 no State might recognise appropriation by its subjects of abandoned foreign vessels and other derelicts on the open sea. But every State could by its Municipal Law enact that those of its subjects who took possession of abandoned vessels and of shipwrecked goods need not restore them to their owners without salvage,² whether the act of taking possession occurred on the open sea or within its territorial waters and on its shore.

The Brussels Convention of 1910 'for the unification of certain rules of law respecting assistance and salvage at sea,'³ recognises the right to salvage, and contains a uniform set of rules to be applied by municipal courts exercising jurisdiction in actions for salvage and claims arising out of assistance rendered to vessels in distress. Such modification in English law as was needed to give effect to its provisions was carried out by the Maritime Conventions Act of 1911.³

As regards vessels in distress,⁴ the same Brussels Convention contains, in Article 11, a provision that every master is bound, so far as he can do so without serious danger to his vessel, her passengers and crew, to render assistance to every person, even though an enemy, found at sea in danger of being lost. The owner of the vessel, however, incurs no liability through disobedience to this provision. Nor does it apply to ships of war, nor to government ships exclusively appropriated to the public service.⁵ Most States, however, by their

¹ See below, §§ 282 and 283.

² See Phillimore, iv. § 815; Dicey, *Conflict of Laws* (2nd ed. 1908), p. 791; and Halsbury, *The Laws of England: Wreck*, vol. xxvi. p. 548. See also §§ 545 and 565 of the

Merchant Shipping Act, 1894.

³ See above, § 265.

⁴ Wireless signals of distress are discussed below in §§ 287a, 287b.

⁵ See Article 14.

municipal regulations, order their men-of-war to render assistance to any vessel found in distress at sea.

V

PIRACY

Hall, §§ 81-82—Westlake, i. pp. 181-186—Lawrence, § 102—Phillimore, i. §§ 356-361—Twiss, i. § 177 and ii. § 193—Halleck, i. pp. 476-483—Taylor, §§ 188-189—Walker, § 21—Wheaton, §§ 122-124—Moore, ii. §§ 311-315—Hershey, Nos. 213-215—Bluntschli, §§ 343-350—Heffter, § 104—Gareis in *Holtzendorff*, ii. pp. 571-581—Gareis, § 58—Liszt, § 26—Ullmann, § 104—Bonfils, Nos. 592-594—Despagnet, Nos. 431-433—Mérignhac, ii. pp. 506-511—Pradier-Fodéré, v. Nos. 2491-2515—Rivier, i. pp. 248-251—Calvo, i. §§ 485-512—Fiore, i. Nos. 494-495, and *Code*, Nos. 300-305—Perels, §§ 16-17—Testa, pp. 90-97—Ortolan, *Diplomatie de la Mer* (1856), i. pp. 231-253—Stiel, *Der Tatbestand der Piraterie* (1905)—Sebert in *Z.I.*, xxvi. (1915), pp. 8-70.

§ 272. Piracy, in its original and strict meaning, is every unauthorised act of violence committed by a private vessel on the open sea against another vessel with intent to plunder (*animo furandi*). The majority of writers confine piracy to such acts, which indeed are the normal cases of piracy. But there are cases possible which are not covered by this narrow definition, and yet they are treated in practice as though they were cases of piracy. Thus, if the members of the crew revolt and convert the ship, and the goods thereon, to their own use, they are considered to be pirates, although they have not committed an act of violence against another ship. Again, if unauthorised acts of violence, such as murder of persons on board the attacked vessel, or destruction of goods thereon, are committed on the open sea without intent to plunder, such acts are in practice considered to be piratical. Therefore several writers,¹ correctly, I think, oppose the usual definition

Concep-
tion of
Piracy.

¹ Hall, § 81; Lawrence, § 102; Bluntschli, § 343; Liszt, § 26; Calvo, § 485.

of piracy as an act of violence committed by a private vessel against another with intent to plunder. But yet no unanimity exists among them concerning a fit definition of piracy, and the matter is therefore very controversial. If a definition is desired which really covers all such acts as are in practice treated as piratical, piracy must be defined as *every unauthorised act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel*.¹

Before a Law of Nations in the modern sense of the term was in existence, a pirate was already considered an outlaw, a 'hostis humani generis.' According to the Law of Nations the act of piracy makes the pirate lose the protection of his home State, and thereby his national character; and his vessel, although she may formerly have possessed a claim to sail under a certain State's flag, loses such claim. Piracy is a so-called 'international crime';² the pirate is considered the enemy of every State, and can be brought to justice anywhere.

Private
Ships as
Subjects
of Piracy.

§ 273. Private vessels only³ can commit piracy. A man-of-war or other public ship, as long as she remains such, is never a pirate. If she commits unjustified acts of violence, redress must be asked from her flag State, which has to punish the commander, and to pay damages where required. But if a man-of-war or other public ship of a State revolts, and cruises the sea for her own purposes, she ceases to be a public ship, and acts of violence then committed by her are indeed piratical acts. A *privateer* is not a pirate as long as her acts of violence are confined to enemy vessels, because such acts are authorised by the belligerent in whose services

¹ The conception of piracy is discussed in *The Republic of Bolivia v. The Indemnity Mutual Marine Assurance Co.*, [1909] 1 K.B. 785.

² See above, § 151.

³ Piracy committed by the mutinous crew will be treated below, § 274.

she is acting. And it matters not that the privateer is originally a neutral vessel.¹ But if a neutral vessel were to take letters of marque from both belligerents, she would be considered a pirate.

Doubtful is the case where a privateer, in a civil war, has received her letters of marque from the insurgents ; and, further, the case where, during a civil war, men-of-war join the insurgents before they have been recognised as a belligerent Power. It is evident that the legitimate Government will treat such ships as pirates ; but third Powers ought not to do so, as long as these vessels do not commit any act of violence against ships of these third Powers. Thus, in 1873, when an insurrection broke out in Spain, Spanish men-of-war stationed at Carthagena fell into the hands of the insurgents, and the Spanish Government proclaimed these vessels pirates, England, France, and Germany instructed the commanders of their men-of-war in the Mediterranean not to interfere as long as these insurgent vessels² abstained from acts of violence against the lives and property of their subjects.³ On the other hand, when in 1877 a revolutionary outbreak occurred at Callao in Peru and the ironclad *Huascar*, which had been seized by the insurgents, put to sea, stopped British steamers,

¹ See details regarding this controversial point in Hall, § 81. See also below, vol. ii. §§ 83 and 330.

² See Calvo, i. §§ 497-501 ; Hall, § 82 ; Westlake, i. pp. 183-186.

³ But in the American case of *The Ambrose Light* (25 Federal 408 ; see also Moore, ii. § 332, p. 1098) the court did not agree with this. The *Ambrose Light* was a brigantine which, when on April 24, 1885, she was sighted by Commander Clark of the U.S.S. *Alliance* in the Caribbean Sea, was flying a strange flag showing a red cross on a white ground, but she afterwards hoisted the Colombian flag ; when seized she was found to carry sixty armed soldiers, one

cannon, and a considerable quantity of ammunition. She bore a commission from Colombian insurgents, and was designed to assist in the blockade of the port of Carthagena by the rebels. Commander Clark considered the vessel to be a pirate and sent her in for condemnation. The court held that in absence of any recognition of the Colombian insurgents as a belligerent Power the *Ambrose Light* had been lawfully seized as a pirate. The vessel was, however, nevertheless released because the American Secretary of State had recognised by implication a state of war between the insurgents and the legitimate Colombian Government.

took a supply of coal without payment from one of these, and forcibly took two Peruvian officials from on board another where they were passengers, she was justly considered a pirate and was attacked by the British Admiral de Horsey, who was in command of the British squadron in the Pacific.¹

It must be emphasised that the motive and the purpose of such acts of violence do not alter their piratical character, since the intent to plunder (*animus furandi*) is not required. Thus, for instance, if a private neutral vessel without letters of marque during war, out of hatred of one of the belligerents, were to attack and to sink vessels of such belligerent without plundering at all, she would nevertheless be considered as a pirate.²

The case must also be mentioned of a privateer or man-of-war which, after the conclusion of peace, or the termination of war by subjugation and the like, continues to commit hostile acts. If such vessel is not cognisant of the fact that the war has come to an end, she cannot be considered as a pirate. Thus the Confederate cruiser *Shenandoah*, which in 1865, for some months after the end of the American Civil War, attacked American vessels, was not considered a pirate³ by the British Government when her commander gave her up to the port authorities at Liverpool in November 1865, because he asserted that he had not known till August of the termination of the war, and that he had abstained from hostilities as soon as he had obtained this information.

§ 274. If the crew, or passengers, revolt on the open sea, and convert the vessel and her goods to their own use, they commit piracy, whether the vessel is private

¹ As regards the case of the Argentinian vessel *Porteña* and the Spanish vessel *Montezuma*, afterwards called *Cespedes*, see Calvo, i. §§ 502 and 503.

² This statement is correct in spite of Article 46, No. 1, of the unratified Declaration of London; see below, vol. ii. § 410 (1).

³ See Lawrence, § 102.

or public. But a simple act of violence on the part of crew or passengers does not constitute in itself the crime of piracy, not at least as far as International Law is concerned. If, for instance, the crew were to murder the master on account of his cruelty, and afterwards carried on the voyage, they would be murderers, but not pirates. They are pirates only when the revolt is directed, not merely against the master, but also against the vessel, for the purpose of converting her and her goods to their own use.

Mutinous
Crew and
Passen-
gers as
Subjects
of Piracy.

§ 275. The object of piracy is any public or private vessel, or the persons or the goods thereon, whilst on the open sea. In the regular case of piracy the pirate wants to make booty; it is the cargo of the attacked vessel which is the centre of his interest, and he might free the vessel and the crew after having appropriated the cargo. But he remains a pirate, whether he does so or whether he kills the crew and appropriates the ship, or sinks her. On the other hand, the cargo need not be the object of his act of violence. If he stops a vessel and takes a rich passenger off with the intention of keeping him for the purpose of a high ransom, his act is piracy: it is likewise piracy if he stops a vessel merely to kill a certain person only on board, although he may afterwards free vessel, crew, and cargo.¹

Object of
Piracy.

§ 276. Piracy is effected by any unauthorised act of violence, be it direct application of force or intimidation through menace. The crew or passengers who, for the purpose of converting a vessel and her goods to their own use, force the master through intimidation to steer another course, commit piracy as well as those who murder the master and steer the vessel themselves. And a ship which forces another ship, by threatening to

Piracy,
how
effected.

¹ That a possible object of piracy is not only another vessel, but also the very ship to which the persons

guilty of piracy belong, is an inference from the statements above in § 274.

sink her if she should refuse, to deliver up her cargo or a person on board, commits piracy just as much as the ship which attacks another vessel, kills her crew, and thereby gets hold of her cargo or a person on board.

The act of violence need not be consummated : a mere attempt, such as attacking or even chasing a vessel for the purpose of attack, by itself comprises piracy. On the other hand, it is doubtful whether persons cruising in armed vessels with the intention of committing piracies are liable to be treated as pirates before they have committed a single act of violence.¹

Where
Piracy
can be
com-
mitted.

§ 277. Piracy as an 'international crime' can be committed on the open sea only. Piracy in territorial coast waters has as little to do with International Law as other robberies within the territory of a State. Some writers² maintain that piracy need not necessarily be committed on the open sea, but that it suffices that the respective acts of violence are committed by descent from the open sea. They maintain, therefore, that if 'a body of pirates land on an island unappropriated by a civilised Power, and rob and murder a trader who may be carrying on commerce there with the savage inhabitants, they are guilty of a crime possessing all the marks of commonplace professional piracy.' With this opinion I cannot agree. Piracy is, and always has been, a crime against the safety of traffic on the open sea, and therefore it cannot be committed anywhere else than on the open sea.

Jurisdic-
tion over
Pirates,
and their
Punish-
ment.

§ 278. A pirate and his vessel lose *ipso facto* by an act of piracy the protection of their flag State and their national character. Every maritime State has, by a customary rule of the Law of Nations, the right to

¹ See Stephen, *Digest of the Criminal Law*, Article 104. In the case of *The Ambrose Light*—see above, § 273—the court considered the vessel to be a pirate, although

no attempt to commit a piratical act had been made by her.

² Hall, § 81; Lawrence, § 102; Westlake, i. p. 181.

punish pirates. And the vessels of all nations, whether men-of-war, other public vessels, or merchantmen,¹ can on the open sea² chase, attack, and seize the pirate, and bring him home for trial and punishment by the courts of their own country.³

This punishment may, by the Law of Nations, be capital. But it need not be, the Municipal Law of the different States being competent to order any less severe punishment. Nor does the Law of Nations make it a duty for every maritime State to punish all pirates.⁴

In former times it was said to be a customary rule of International Law that pirates could at once after seizure be hanged or drowned by the captor. But this cannot now be upheld, although some writers assert that it is still the law. It would seem that the captor may execute pirates on the spot only when he is not able to bring them safely into a port for trial; but Municipal Law may, of course, interdict such execution.

§ 279. The question as to the property in the seized piratical vessels, and the goods thereon, has been the subject of much controversy. During the seventeenth century, the practice of several States conceded such vessel and goods to the captor as a premium. But during the eighteenth century, the rule *pirata non mutat dominium* became more and more recognised. Nowadays the conviction would seem to be general that

¹ A few writers (Gareis in *Holtendorff*, ii. p. 575; Liszt, § 26; Ullmann, § 104; Stiel, *op. cit.*, p. 51) maintain, however, that men-of-war only have the power to seize the pirate.

² If a pirate is chased on the open sea and flees into the territorial maritime belt, the pursuers may follow, attack, and arrest the pirate there; but they must give him up to the authorities of the littoral State.

³ That men-of-war of all nations have, with a view to ensuring the safety of traffic, the power of verify-

ing the flags of suspicious merchantmen of all nations, has already been stated above (§ 266 (2)).

⁴ Thus, according to the German Criminal Code, piracy committed by foreigners against foreign vessels cannot be punished by German courts (see Perels, § 17). From Article 104 of Stephen's *Digest of the Criminal Law*, there seems to be no doubt that, according to English law, all pirates are liable to be punished. See Stiel, *op. cit.*, p. 15, n. 4, who surveys the Municipal Law of many States concerning this point.

ship and goods must be restored to their owners and may be conceded to the captor only when their real ownership cannot be ascertained. In the first case, however, a certain percentage of the value is very often conceded to the captor as a premium and an equivalent for his expenses (so-called *droit de recousse*).¹ Thus, according to English law,² a salvage of 12½ per cent. is to be paid to the captor of the pirate.

Piracy
according
to Muni-
cipal Law.

§ 280. Piracy, according to the Law of Nations, which has been defined above (§ 272), must not be confounded with the conception of piracy according to the different Municipal Laws.³ The several States may confine themselves to punishing as piracy fewer acts of violence than those which the Law of Nations defines as piracy. On the other hand, they may punish their own subjects as pirates for a much wider range of acts. Thus, for instance, according to the Criminal Law of England,⁴ every British subject is, *inter alia*, deemed to be a pirate who gives aid or comfort upon the sea to the King's enemies during a war, or who transports slaves on the high seas.

However, since a State cannot enforce its Municipal Laws on the open sea against others than its own subjects, it cannot treat foreigners on the open sea as pirates, unless they are pirates according to the Law of Nations. Thus, when in 1858, before the abolition of slavery in America, British men-of-war molested American vessels suspected of carrying slaves, the United States rightly complained.⁵

¹ See details regarding the question as to the piratical vessels and goods in Pradier-Fodéré, v. Nos. 2496-2499.

² See § 5 of the 'Act to repeal an Act of the Sixth Year of King George the Fourth, for encouraging the Capture or Destruction of Piratical Ships, etc.' (13 & 14 Vict. c. 26).

³ See Calvo, §§ 488-492; Lawrence, § 103; Pradier-Fodéré, v. Nos. 2501 and 2502.

⁴ See Stephen, *Digest of the Criminal Law*, Articles 104-117.

⁵ See Wharton, iii. § 327, pp. 142 and 143; Taylor, § 190; Moore, ii. § 310, pp. 941-946.

VI

FISHERIES IN THE OPEN SEA

Grotius, ii. c. 2, § 3—Vattel, i. § 282—Hall, § 27—Lawrence, §§ 86 and 91—Phillimore, i. §§ 189-195—Twiss, i. § 185—Taylor, §§ 249-250—Wharton, iii. §§ 300-308—Wheaton, §§ 167-171—Moore, i. §§ 169-173—Bluntschli, § 307—Stoerk in *Holtzendorff*, ii. pp. 504-507—Gareis, § 62—Liszt, § 35—Ullmann, § 103—Bonfils, Nos. 581-582, 595—Despagnet, Nos. 411-413—Mérignhac, ii. p. 531—Pradier-Fodéré, v. Nos. 2446-2458—Rivier, i. pp. 243-244—Nys, ii. pp. 205-209—Calvo, i. §§ 357-364—Fiore, ii. Nos. 728-729, and *Code*, Nos. 1000-1004—Martens, i. § 98—Perels, § 20—Hall, *Foreign Powers and Jurisdiction* (1894), § 107—David, *La Pêche maritime au Point de Vue international* (1897)—Fulton, *The Sovereignty of the Seas* (1911), pp. 57-534.

§ 281. Whereas the fisheries in the territorial maritime belt can be reserved by the littoral State for its own subjects, it is an inference from the freedom of the open sea that the fisheries thereon are open¹ to vessels

Fisheries in the Open Sea free to all Nations.

¹ Denmark, silently, by fishing regulations of 1872, dropped her claim to an exclusive right of fisheries within twenty miles of the coast of Iceland; see Hall, § 40. Russia promulgated, in 1911, a statute forbidding the fisheries to foreign vessels within twelve miles of the shore of the White Sea, but the Powers protested against this encroachment upon the freedom of the open sea.

A case of a particular kind would seem to be the pearl fishery off Ceylon, which extends to a distance of twenty miles from the shore, and for which regulations exist which are enforced against foreign as well as British subjects. The claim on which these regulations are based is one 'to the products of certain submerged portions of land which have been treated from time immemorial by the successive rulers of the island as subject of property and jurisdiction.' See Hall, *Foreign Powers and Jurisdiction* (1894), p. 243, n. 1. See also Westlake, i. p. 190, who says: 'The case of the pearl fishery is peculiar, the pearls being obtained from the sea bottom by divers, so that it has

a physical connection with the stable element of the locality which is wanting to the pursuit of fish swimming in the water. When carried on under State protection, as that off the British island of Ceylon, or that in the Persian Gulf which is protected by British ships in pursuance of treaties with certain chiefs of the Arabian mainland, it may be regarded as an occupation of the bed of the sea. In that character the pearl fishery will be territorial even though the shallowness of the water may allow it to be practised beyond the limit which the State in question generally fixes for the littoral seas, as in the case of Ceylon it is practised beyond the three miles limit generally recognised by Great Britain. "Qui doutera," says Vattel (i. § 287), "que les pêcheries des perles de Bahrem et de Ceylan ne puissent légitimement tomber en propriété?" And the territorial nature of the industry will carry with it, as being necessary for its protection, the territorial character of the sea at the spot.' This opinion of Westlake coincides with that contended by Great Britain during the Behring Sea Arbitration; see *Parl. Papers*, United

of all nations. Since, however, vessels remain whilst on the open sea under the jurisdiction of their flag State, every State possessing a maritime flag can legislate for the exercise of fisheries by its own vessels on the open sea; and it can by an international agreement renounce its fishing rights on certain parts of the open sea, and can accordingly interdict its vessels from fishing there. So if it is advisable to restrict and regulate the fisheries on some parts of the open sea, the Powers can do this through international treaties. Such treaties have been concluded—first, with regard to the fisheries in the North Sea and the suppression of the liquor trade among the fishing vessels there; secondly, with regard to the seal fisheries in the North Pacific Ocean; thirdly, with regard to the fisheries around the Farøe Islands and Iceland.

Fisheries
in the
North
Sea.

§ 282. For the purpose of regulating the fisheries in the North Sea, an international conference took place at the Hague in 1881 and again in 1882, at which Great Britain, Belgium, Denmark, France, Germany, Holland, and Sweden-Norway were represented, and on May 6, 1882, the International Convention for the Regulation of the Police of the Fisheries in the North Sea outside the Territorial Waters¹ was signed by the representatives of all these States, Sweden-Norway excepted, to which the option of joining later on was given. This treaty contains the following stipulations: ²

(1) All the fishing vessels of the signatory Powers

States, No. 4 (1893), Behring Sea Arbitration Archives of His Majesty's Government, pp. 51 and 59. But it is submitted that the bed of the open sea is not a possible object of occupation. The explanation of the pearl fisheries off Ceylon and in the Persian Gulf being exclusively British is to be found in the fact that the freedom of the open sea was not a rule of International Law when these fisheries were taken possession of. See Oppenheim in *Z.V.*, ii.

(1908), pp. 6-10, and Westlake, i. p. 203.

¹ Martens, *N.R.G.*, 2nd Ser. ix. p. 556.

² The matter is exhaustively treated by Rykere, *Le Régime légal de la Pêche maritime dans la Mer du Nord* (1901). To carry out the obligations undertaken by her in the North Sea Fisheries Convention, Great Britain enacted The North Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22).

must be registered, and the registers have to be exchanged (Article 5). Every vessel has to bear visibly in white colour on black ground her number, name, and harbour, and an official voucher of her nationality (Articles 6-13).

(2) To avoid conflicts between the different fishing vessels, very minute rules are provided (Articles 14-25).

(3) Special cruisers of the signatory Powers supervise their fishing vessels engaged in the fisheries (Article 26). All these cruisers¹ are competent to verify all contraventions (other than those expressly excepted) committed by the fishing vessels of all the signatory Powers (Articles 27-28). For that purpose they have the right of visit, search, and arrest, and may compromise trifling matters on the spot (Articles 29 and 33). But an arrested fishing vessel is to be brought into a harbour of her flag State, and handed over to the authorities there (Article 30); and all contraventions are to be tried by the courts of the State to which the contravening vessels belong (Article 36).

§ 283. Connected with the regulation of the fisheries is the abolition of the liquor trade among the fishing vessels in the North Sea. Since serious quarrels and difficulties were caused through bumboats and floating grog-shops selling intoxicating liquors to the fishermen, an international conference took place at the Hague in 1886, where the signatory Powers of the North Sea Fisheries Convention were represented. On November 16, 1887, the International Convention concerning the Abolition of the Liquor Traffic among the Fishermen in the North Sea was signed by the representatives of these Powers—namely, Great Britain, Belgium, Denmark,

Bumboats
in the
North
Sea.

¹ But it is provided by the Treaty of Peace with Germany, by which the High Contracting Parties agree to apply this convention in so far as concerns them as from the coming into force of that treaty, that all

rights of inspection and police over fishing boats belonging to the Allied Powers, shall be exercised solely by ships belonging to those Powers (Articles 285 and 272).

France, Germany, and Holland. This treaty¹ was, however, not ratified until 1894, and France did not ratify it at all. It contains the following stipulations:²

It is interdicted to sell spirituous drinks to persons on board fishing vessels, who are prohibited from buying them (Article 2). Bumboats, which wish to sell provisions to fishermen, must be licensed by their flag State and must fly a white flag³ with the letter S in black in the middle (Article 3). The special cruisers of the Powers which supervise the fisheries in the North Sea⁴ are likewise competent to supervise the treaty stipulations concerning bumboats; they have the right to ask for the production of the proper licence, and, if need be, to arrest the vessel (Article 7). But arrested vessels must always be brought into a harbour of their flag State, by the courts of which all contraventions are to be tried (Articles 5, 7, 8).

Seal
Fisheries
in the
North
Pacific
Ocean.

§ 284. In 1886 a conflict arose between Great Britain and the United States through the seizure and confiscation of British-Columbian vessels which had hunted seals in the Behring Sea outside the American territorial belt, infringing regulations made by the United States concerning seal fishing in that sea. Great Britain and the United States concluded an arbitration treaty⁵ concerning this conflict in 1892, according to which the arbitrators were not only to settle the dispute itself, but also (Article 7) 'determine what concurrent regulations outside the jurisdictional limits of the respective Govern-

¹ See Martens, *N.R.G.*, 2nd Ser. xiv. p. 540, and xxii. p. 562.

² The matter is treated by Guillaume in *R.I.*, xxvi. (1894), p. 488.

³ This flag was agreed upon in the protocol concerning the ratification of the convention. (See Martens, *N.R.G.*, 2nd Ser. xxii. p. 563.)

⁴ The Treaty of Peace with

Germany provides (as in the case of the North Sea Fisheries Convention) that rights of inspection and police over fishing boats belonging to Allied Powers are to be exercised solely by ships belonging to those Powers (Articles 285 and 272).

⁵ See Martens, *N.R.G.*, 2nd Ser. xviii. p. 587.

ments are necessary ' in the interest of the preservation of the seals. The Arbitration Tribunal, which gave its award ¹ at Paris in 1893, called upon both parties to forbid their subjects to kill seals within a zone of sixty miles around the Pribiloff Islands; to kill seals at all between May 1 and July 31 each year; to engage in sealing with nets, firearms and explosives, or in other than specially licensed sailing vessels. Both parties in 1894 carried out this task; ² other maritime Powers were asked by the United States to submit voluntarily to the regulations made for the parties by the arbitrators, but only Italy ³ agreed to this.

Experience showed that the provisions made by the Arbitration Tribunal were insufficient to prevent the extinction of seals. The United States therefore invited Great Britain, Russia, and Japan to a Pelagic Seal Conference at Washington in 1911, where there was signed, on July 7, 1911, a convention ⁴ 'respecting Measures for the Preservation and Protection of the Fur Seals in the North Pacific Ocean.' By this convention *seal fishing* in the open sea is entirely prohibited in the North Pacific Ocean north of the thirtieth parallel of north latitude—an area including the Behring and Kamschatka Seas and the Seas of Okhotsk and Japan. It is likewise prohibited to kill, capture, or pursue *sea otters* beyond three miles from the shore of territory belonging to the signatory Powers, which have to keep special cruisers to enforce these prohibitions. Sealing

¹ See Martens, *N.R.G.*, 2nd Ser. xxi. p. 439. The award is discussed by Barclay in *R.I.*, xxv. (1893), p. 417, and Engelhardt in *R.I.*, xxvi. (1894), p. 386, and *R.G.*, v. (1898), pp. 193 and 347. See also Tillier, *Les Pêcheries de Phoques de la Mer de Behring* (1906), and Balch, *L'Évolution de l'Arbitrage international* (1908), pp. 70-91.

² See the Behring Sea Award Act, 1894 (57 Vict. c. 2), and Seal Fisheries

(North Pacific) Act, 1895 (58 & 59 Vict. c. 21).

³ See Martens, *N.R.G.*, 2nd Ser. xxii. p. 624.

⁴ See Martens, *N.R.G.*, 3rd Ser. v. p. 720, and Treaty Ser. (1912), No. 2. Great Britain and the United States had already, on February 7, 1911, concluded a treaty concerning the same matter; see Martens, *N.R.G.*, 3rd Ser. v. p. 717, and Treaty Ser. (1911), No. 25. See also below, § 593 (2).

is *not* prohibited within the territorial waters of the signatory Powers, but arrangements are made to hand over a fixed proportion of the catch taken on certain islands by subjects of the State exercising sovereignty thereon to agents of other parties to the convention. The convention is to remain in force for fifteen years from December 15, 1911, and thereafter until terminated by twelve months' written notice. In Great Britain Parliament passed the Seal Fisheries (North Pacific) Act, 1912, to carry out its provisions.¹

Fisheries
around
the Farøe
Islands
and Ice-
land.

§ 285. For the purpose of regulating the fisheries outside territorial waters around the Farøe Islands and Iceland, Great Britain and Denmark signed on June 24, 1901, the Convention of London,² whose stipulations are for the most part literally the same as those of the North Sea Fisheries Convention, concluded at the Hague in 1882.³ The additional article of this Convention of London stipulates that any other State whose subjects fish around the Farøe Islands and Iceland may accede to it.

VII

TELEGRAPH CABLES IN THE OPEN SEA

Bonfils, No. 583—Despagnet, No. 401—Pradier-Fodéré, v. No. 2548—Mérignhac, ii. p. 532—Nys, ii. pp. 210-211—Rivier, i. pp. 244 and 386—Fiore, ii. No. 822, and *Code*, Nos. 1139-1142—Stoerk in *Holtzendorff*, ii. pp. 507-508—Liszt, § 29—Ullmann, §§ 103 and 147—Lauterbach, *Die Beschädigung unterseeischer Telegraphenkabel* (1889)—Landois, *Zur Lehre vom völkerrechtlichen Schutz der submarinen Telegraphenkabel* (1894)—Jouhannaud, *Les Câbles sous-marins* (1904)—Renault in *R.I.*, xii. (1880), p. 251, xv. (1883), p. 17. See also the literature quoted below, vol. ii., at the commencement of § 214.

¹ 2 & 3 Geo. v. c. 10.

² See Martens, *N.R.G.*, 2nd Ser.

xxxiii. (1906), p. 268.

³ See above, § 282.

§ 286. It is a consequence of the freedom of the open sea that no State can prevent another from laying telegraph and telephone cables in any part of the open sea, whereas no State need allow this within its territorial maritime belt. As numerous submarine cables have been laid, the question as to their protection arose. Already in 1869 the United States proposed an international convention for this purpose, but the matter dropped in consequence of the outbreak of the Franco-German war. The Institute of International Law took up the matter in 1879¹ and recommended an international agreement. In 1882 France invited the Powers to an international conference at Paris for the purpose of regulating the protection of submarine cables. This conference met in October 1882, again in October 1883, and produced the International Convention for the Protection of Submarine Telegraph Cables, which was signed at Paris on March 14, 1884,² by Great Britain, Argentina, Austria-Hungary, Belgium, Brazil, Colombia, Costa Rica, Denmark, San Domingo, France, Germany, Greece, Guatemala, Holland, Italy, Persia, Portugal, Roumania, Russia, Salvador, Serbia, Spain, Sweden-Norway, Turkey, the United States, and Uruguay. Colombia and Persia did not ratify. Japan acceded later.

Telegraph
Cables in
the Open
Sea per-
mitted.

§ 287. Its principal provisions are as follows :

(1) Intentional or culpably negligent breaking or damaging of a cable in the open sea is to be punished by all the signatory Powers,³ except in the case of such damage having been caused in the effort of self-preservation (Article 2).

Interna-
tional
Protec-
tion of
Sub-
marine
Telegraph
Cables.

(2) Ships within sight of buoys indicating cables which are being laid, or which are damaged, must keep at least a quarter of a nautical mile distant (Article 6).

¹ See *Annuaire*, iii. pp. 351-394.

³ See the Submarine Telegraph Act, 1886 (48 & 49 Vict. c. 49).

² See Martens, *N.E.G.*, 2nd Ser. xi. p. 281.

(3) For dealing with infractions of the interdictions and injunctions of the treaty the courts of the flag State of the infringing vessel are exclusively competent (Article 8).

(4) Men-of-war of all signatory Powers have a right to stop and verify the nationality of merchantmen of all nations which are suspected of having infringed the regulations of the treaty (Article 10).

(5) All stipulations are made for the time of peace only, and in no wise restrict the action of belligerents during time of war.¹

VIII

WIRELESS TELEGRAPHY ON THE OPEN SEA

Bonfils, No. 531¹⁷—Despagne, 433 *quater*—Liszt, § 29—Ullmann, § 147—Meili, *Die drahtlose Telegraphie*, etc. (1908)—Sohneeli, *Drahtlose Telegraphie und Völkerrecht* (1908)—Landsberg, *Die drahtlose Telegraphie* (1909)—Kausen, *Die drahtlose Telegraphie im Völkerrecht* (1910)—Thurn, *Die Funkentelegraphie im Recht* (1913)—Devaux, *La Télégraphie sans fil* (1914)—Loewengard, *Die internationale Radiotelegraphie im internationalen Recht* (1915)—Rolland in *R.G.*, xiii. (1906), pp. 58-92—Fauchille in *Annuaire*, xxi. (1906), pp. 76-87—Meurer and Boidin in *R.G.*, xvi. (1909), pp. 76 and 261.

Unsatisfactory Results of the Wireless Telegraphy Conference of Berlin.

§ 287*a*. To secure wireless communication² between the ships of all nations at sea, and between them and the land, a largely attended conference met at Berlin in 1906, and produced two conventions, namely, an International Radiotelegraphic Convention³ and an Additional Convention.⁴ The former,

¹ See below, vol. ii. § 214, and Article 54 of the Hague rules concerning land warfare, which enacts: 'Submarine cables connecting a territory occupied with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They also must be restored and indemnities for them

regulated at the peace.'

² See above, § 174, and below, §§ 464 and 582 (4).

³ See Martens, *N.R.G.*, 3rd Ser. iii. p. 147; Treaty Ser. (1909), No. 8.

⁴ See Martens, *N.R.G.*, 3rd Ser. iii. p. 158.

which secured radiotelegraphic, or wireless, communication between coast stations and ships at sea, was signed by all the States represented at the conference. But it did not secure similar communication between one ship at sea and another; and the Additional Convention, which did provide for the interchange of communications by all ships at sea possessing wireless installations without regard to the particular system employed, did not obtain the signature of Great Britain and five other Powers. This was a matter of great regret on account of the importance of wireless communication in cases of distress.

For instance, it was possible for the following case,¹ to which the delegate of the United States drew the attention of the Berlin Conference, to occur again when a ship belonging to a State which had not signed the Additional Convention was involved. The American steamer *Lebanon* had received orders to search the Atlantic for a wrecked vessel which offered great danger to navigation. The *Lebanon* came within communicating reach of the liner *Vaderland*, and inquired by wireless telegraphy whether the *Vaderland* had seen the wreck. The *Vaderland* refused to reply to this question, on the ground that she was not permitted to enter into communication with a ship provided with a wireless apparatus other than the Marconi.

§ 287*b*. Better results were, however, obtained by the International Conference on Wireless Telegraphy which met in London in 1912, and was attended by representatives of thirty Powers: Great Britain, Germany, the United States of America, Argentina, Austria-Hungary, Belgium, Brazil, Bulgaria, Chili, Denmark, Egypt, Spain, France, Tunis, Greece, Italy, Japan, Morocco, Monaco, Norway, Holland, Persia, Portugal, Roumania, Russia, San Marino, Siam, Sweden, Turkey,

Results of
the Wire-
less Tele-
graphy
Confer-
ence of
London.

¹ See Hazeltine, *The Law of the Air* (1911), p. 101.

and Uruguay. All these Powers signed, on July 5, 1912, the International Radiotelegraphic Convention¹ which took the place of the two Berlin conventions of 1906. The most important of its stipulations are the following :

After distinguishing between a *coast station*, i.e. any radiotelegraphic station established on dry land, or on board any ship permanently anchored, and utilised for the exchange of correspondence of ships at sea, and a *ship station*, i.e. any radiotelegraphic station established on board a ship other than a permanently anchored ship, the convention provides that such coast stations and ship stations as are open for the service of public correspondence between the land and ships at sea, and likewise ship stations among themselves, must exchange radiotelegrams reciprocally without distinction based upon the radiotelegraphic system adopted. Each contracting party undertakes to ensure a rapid exchange of messages between the coast stations and its telegraph system. All radiotelegraph stations are bound to accept and answer calls of distress from whatever quarter, to give them absolute priority, and to take such action with regard to them as may be necessary. The service regulations accompanying the convention are of equal validity ; and both they, and the convention, are subject to modification at periodical conferences, each conference fixing the time and place of the succeeding conference.² The International Telegraph Office at Berne³ is to collect, co-ordinate, and publish information of every kind relating to radiotelegraphy, to investigate suggested amendments to the convention or the service regulations, and, in general, to undertake

¹ Treaty Ser. (1913), No. 10.

² 1917 was fixed as the time, and Washington as the place, for the next conference ; but owing to

the World War it did not take place.

³ See below, §§ 464 and 582.

administrative work in the interests of international radiotelegraphy.¹

On the initiative of the British Government, the conference adopted unanimously a resolution in favour of the principle of compulsory equipment of certain classes of ships with wireless telegraph installations, with a view to preventing disasters at sea and rendering assistance in cases of distress.

IX

THE SUBSOIL BENEATH THE SEA BED

§ 287*c*. The subsoil beneath the bed of the open sea requires special consideration, on account of coal or other mines, tunnels, and the like. For the answer to the question whether mines and tunnels can be driven into that subsoil at all, and, if so, whether they can be under the territorial supremacy of a particular State, depends entirely upon the character in law of such subsoil. If the subsoil beneath the bed of the open sea stood in the same relation to the open sea as the subsoil beneath the territory of a State stands to that territory,² all rules concerning the open sea would necessarily have to be applied to the subsoil beneath its bed, and no part of this subsoil could ever come under the territorial supremacy of any State. It is, however, submitted³ that it would not be rational to consider the subsoil beneath the bed of the open sea as an inseparable appurtenance of the open sea, just as the sub-

Five
Rules
concern-
ing the
Subsoil
beneath
the Sea
Bed.

¹ By the Treaty of Peace with Germany (Article 284), the High Contracting Parties are to apply this convention, in so far as concerns them, on condition that Germany fulfils the provisional regulations indicated to her by the Allied and Associated Powers. If this convention is replaced by a new convention

within five years of the coming into force of the Treaty of Peace, the new convention is to be binding upon Germany. The Treaty of Peace with Austria contains corresponding stipulations (Article 236).

² See above, §§ 173, 175.

³ See Oppenheim in *Z. V.*, ii, (1908), p. 11.

soil beneath the territorial land and water is an appurtenance of such territory. The rationale of the open sea being free and for ever excluded from occupation on the part of any State is that it is an international highway, which connects distant lands, and thereby secures freedom of communication, and especially of commerce, between States separated by the sea.¹ There is no reason whatever for extending this freedom of the open sea to the subsoil beneath its bed. On the contrary, there are practical reasons—taking into consideration the building of mines, tunnels, and the like—which compel recognition of the fact that this subsoil can be acquired through occupation. The following five rules recommend themselves :

(1) The subsoil beneath the bed of the open sea is no man's land, and it can be acquired on the part of a littoral State through occupation, starting from the subsoil beneath the bed of the territorial maritime belt.

(2) This occupation takes place *ipso facto* by a tunnel or a mine being driven from the shore through the subsoil of the maritime belt into the subsoil of the open sea.

(3) This occupation of the subsoil of the open sea can be extended up to the boundary line of the subsoil of the territorial maritime belt of another State, for no State has an exclusive claim to occupy such part of the subsoil of the open sea as is adjacent to the subsoil of its territorial maritime belt.

(4) An occupation of the subsoil beneath the bed of the open sea for a purpose which would endanger the freedom of the open sea is inadmissible.

(5) It is likewise inadmissible to make such arrangements in a part of the subsoil beneath the open sea which has previously been occupied for a legitimate

¹ See above, § 259.

purpose as would indirectly endanger the freedom of the open sea.

If these five rules are correct, there is nothing to prevent coal and other mines which are being exploited on the shore of a littoral State from being extended into the subsoil beneath the open sea up to the boundary line of the subsoil beneath the territorial maritime belt of another State. Further, a tunnel which might be built between two parts of the same State separated by the open sea—for instance, between Ireland and Scotland—would fall entirely under the territorial supremacy of the State concerned. On the other hand, for a tunnel between two different States separated by the open sea—as, for instance, the proposed Gibraltar tunnel between the Spanish coast and either Tangier or Ceuta—special arrangements would have to be made by treaty concerning the territorial supremacy over that part of the tunnel which runs under the bed of the open sea.

§ 287*d*. Since there is as yet no submarine tunnel in existence, it is of interest to give some details concerning the project of a Channel Tunnel¹ between Dover and Calais, and the preliminary arrangements between France and England concerning it. Already some years before the Franco-German War the possibility of such a tunnel was discussed, but it was not until 1874 that the first preliminary steps were taken. The subsoil of the Channel was geologically explored, plans were worked out, and a shaft of more than a mile long was tentatively bored from the English shore. In 1876 an international commission, appointed by the English and French Governments, and comprising three French and three English members, made a report on the con-

The
proposed
Channel
Tunnel.

¹ See Oppenheim in *Z. V.*, ii. (1908), pp. 1-16; Robin in *R. G.*, xv. (1908), pp. 50-77; Liszt, § 26; and Colombos,

Le Tunnel sous la Manche et le Droit international (1915).

struction and working of the proposed tunnel.¹ The report enclosed a memorandum, recommended by the commissioners as a basis for a treaty between Great Britain and France concerning the tunnel.

This memorandum suggested (Article 1) that the boundary between England and France in the tunnel (and for the purposes of the tunnel and submarine railway alone) should be half-way between low-water mark (above the tunnel) on the coast of England and low-water mark (above the tunnel) on the coast of France.

It recommended that (Article 4) an international commission consisting of six members, three of whom should be nominated by the British Government and three by the French Government, should submit to the two Governments its proposals for supplementary conventions with respect to (a) the apprehension and trial of alleged criminals for offences committed in the tunnel or in trains which have passed through it, and the summoning of witnesses; (b) customs, police, and postal arrangements, and other matters which it might be found convenient so to deal with. It further advised

(Article 15) that each Government should have the right to suspend the working of the submarine railway and the passage through the tunnel whenever such Government, in the interest of its own country, thought necessary to do so, and even to damage or destroy² the works of the tunnel or submarine railway, or any part of them, in the territory of such Government, and flood the tunnel with water.

In spite of this elaborate preparation the project could not be realised, since public opinion in England was for political reasons opposed to it. And although

¹ See *Parl. Papers*, C. 1576, Report of the Commissioners for the Channel Tunnel and Railway, 1876.

² This stipulation was proposed in

the interest of defence in time of war. As regards the position of a Channel Tunnel in time of war, see Oppenheim in *Z.V.*, ii. (1908), pp. 13-16.

in 1880, 1884, 1888, 1908, and 1911 ¹ steps were again taken in favour of the proposed tunnel, public opinion in England remained hostile until the World War, and the project had for the time to be abandoned. Since the armistice with Germany, concluded on November 11, 1918, a new movement has arisen for the construction of a Channel Tunnel, and the supporters of the plan reinforce their arguments from the experiences of the World War. The question is now under the consideration of the British Government.

¹ See Fell, *The Position of the Channel Tunnel Question in May 1914* (1914).

CHAPTER III

INDIVIDUALS

I

POSITION OF INDIVIDUALS IN INTERNATIONAL LAW

Lawrence, § 42—Taylor, § 171—Hershey, No. 222—Heffter, § 58—Stoerk in *Holtendorff*, ii. pp. 585-592—Gareis, § 53—Liszt, §§ 5 and 11—Ullmann, § 107—Bonfils, Nos. 397-409—Despagnet, No. 328—Mérignhac, ii. pp. 169-172—Pradier-Fodéré, i. Nos. 43-49—Fiore, i. Nos. 684-712—Martens, i. §§ 85-86—Jellinek, *System der subjectiven öffentlichen Rechte* (1892), pp. 310-314—Heilborn, *System*, pp. 58-138—Kaufmann, *Die Rechtskraft des internationalen Rechtes* (1899)—Buonvino, *Diritto e Personalità giuridica internazionale* (1910)—Borchard, §§ 7-10—Rehm and Adler in *Z.V.*, i. (1907), pp. 53-55 and 614-618—Kohler in *Z.V.*, ii. (1908), pp. 209-230—Diena in *R.G.*, xvi. (1909), pp. 57-76.

Importance of Individuals to the Law of Nations.

§ 288. Individuals are just as important to the Law of Nations as territory, for individuals are the personal basis of every State. Just as a State cannot exist without a territory, so it cannot exist without a multitude of individuals who are its subjects and who, as a body, form the people or the nation. The individuals belonging to a State can, and do, come in various ways in contact with foreign States in time of peace as well as of war. The Law of Nations is therefore compelled to provide certain rules regarding individuals.

Individuals never Subjects of the Law of Nations.

§ 289. Now, what is the position of individuals in International Law according to these rules? Since, apart from the League of Nations, the Law of Nations is a law between States only and exclusively, States only and exclusively¹ are subjects of the Law of Nations.

¹ See above, §§ 13 and 63.

How is it then, that, although individuals are not subjects of the Law of Nations, they have certain rights and duties in conformity with, or according to, International Law? Have not monarchs and other heads of States, diplomatic envoys, and even simple citizens certain rights according to the Law of Nations whilst on foreign territory? If we look more closely into these rights, it becomes quite obvious that they are not given to the favoured individual by the Law of Nations directly. For how could International Law, which is a law between States, give rights to individuals concerning their relations to a State? What the Law of Nations really does concerning individuals is to impose the duty upon all the members of the Family of Nations to grant certain privileges to such foreign heads of States and diplomatic envoys, and certain rights to such foreign citizens, as are on their territory. And, corresponding to this duty, every State has by the Law of Nations a right to demand that its head, its diplomatic envoys, and its citizens be granted certain rights by foreign States when on their territory. Foreign States granting these rights to foreign individuals do this by their Municipal Laws, and these rights are, therefore, not international rights, but rights derived from Municipal Laws. International Law is indeed the background of these rights, in so far as the duty to grant them is imposed upon the several States by International Law. It is therefore quite correct to say that the individuals have these rights in conformity with, or according to, International Law, if only it is remembered that these rights would not exist had the several States not created them by their Municipal Law.

And the same is valid as regards special rights of individuals in foreign countries according to special international treaties between two or more Powers.

Although such treaties generally speak of rights which individuals shall have as derived from the treaties themselves, this is nothing more than an inaccuracy of language. In fact, such treaties do not create these rights, but they impose the duty upon the contracting States of calling these rights into existence by their Municipal Laws.¹

Again, where States stipulate by international treaties certain favours for individuals other than their own subjects, these individuals do not acquire any international rights under these treaties, but the State whose subjects they are has an obligation towards the other States of granting such favours by its Municipal Law. Thus, for example, when Articles 5, 27, 35, and 44 of the Treaty of Berlin, 1878, made it a condition of the recognition of Bulgaria, Montenegro, Serbia, and Roumania, that these States should not impose any religious disability upon their subjects, the latter did not thereby acquire any international rights.² Another instructive example³ is furnished by Article 5 of the Peace Treaty of Prague, 1866, between Prussia and Austria, which stipulated that the northern district of Schleswig should be ceded by Prussia to Denmark in case the inhabitants should by a plebiscite vote in favour of such cession. Austria, no doubt, intended to secure by this stipulation for the inhabitants of North Schleswig the opportunity of voting in favour of their union with Denmark. But these inhabitants did not thereby acquire any international right; Austria alone acquired a right to insist upon Prussia granting to the inhabitants

¹ The whole matter is treated with great lucidity by Jellinek, *System der subjectiven öffentlichen Rechte* (1892), pp. 310-314, and Heilborn, *System*, pp. 58-138.

² Nor again, under the series of clauses for the protection of racial, religious, or linguistic minorities inserted in some of the treaties of peace

and in various treaties between the Principal Allied and Associated Powers and other Powers which form part of the resettlement after the World War (see below, § 568*h*), do the individuals in whose favour these provisions have been made acquire any international rights.

³ See Heilborn, *System*, p. 67.

the opportunity of voting for the union with Denmark. Prussia, however, intentionally neglected her duty, Austria did not insist upon her right, and finally relinquished it by the Treaty of Vienna of 1878.¹ So the matter stood until the Treaty of Peace with Germany (Articles 109-114) again stipulated for a plebiscite within a certain area of Northern Schleswig.

The assertion² that, although individuals cannot be subjects of International Law, they can nevertheless acquire rights and duties from International Law, is untenable as a general proposition. International Law cannot grant *international* rights to individuals, for international rights and duties can only exist between States, or between the League of Nations and States. International Law cannot give *municipal* rights to individuals, for municipal rights and duties can only be created by Municipal Law. However, where International Law creates an independent organisation—for instance, the proposed International Prize Court at the Hague, or the European Danube Commission, and the like—certain powers may be granted to commissions, courts, councils, and even to individuals concerned. These powers are legal powers, and are therefore justly called rights, although they are neither international nor municipal rights, but only rights within the organisation concerned. Thus the unratified Convention XII. of the second Hague Peace Conference provided for an International Prize Court to which—see Articles 4 and 5—individuals could bring an appeal.³ Thereby

¹ It ought to be mentioned that the opinion presented in the text concerning the impossibility for individuals to be subjects of International Law, which is now mostly upheld, is vigorously opposed by Kaufmann, *Die Rechtskraft des internationalen Rechtes* (1899), §§ 1-4, and a few others.

² See Diena in *R.G.*, xvi. (1909),

pp. 57-76; Rehm and Adler in *Z.V.*, i. (1907), pp. 53 and 614; Liszt, § 5; Kohler in *Z.V.*, ii. (1908), pp. 209-230.

³ The position of individuals in this case is discussed by Wehberg, *Das Seekriegsrecht* (1915), pp. 362-364. See also Lammasch, *Die Lehre von der Schiedsgerichtbarkeit* (1913), pp. 158-161, and Borchard, § 9.

a right would be given to individuals ; but it would be neither an international nor a municipal right, but only a right within the independent organisation¹ intended to be set up by Convention XII.

Indi-
viduals
Objects
of the
Law of
Nations.

§ 290. But what is the real position of individuals in International Law, if they are not subjects thereof ? The answer can only be that they are *objects* of the Law of Nations. They appear as such from many different points of view. When, for instance, the Law of Nations is seen to recognise the personal supremacy of every State over its subjects at home and abroad, these individuals appear as objects of the Law of Nations just as does State territory in consequence of the recognised territorial supremacy of every State. When, secondly, the recognised territorial supremacy of every State is seen to comprise certain powers over foreign subjects within its boundaries with the exercise of which their home State has no right to interfere, these individuals appear again as objects of the Law of Nations. And, thirdly, when it is seen that, according to the Law of Nations, any State may seize and punish foreign pirates on the open sea, or that belligerents may seize and punish neutral blockade-runners and carriers of contraband on the open sea without their home State having a right to interfere, individuals appear once more as objects of the Law of Nations.²

§ 291. If, as stated, individuals are never subjects but always objects of the Law of Nations, then nationality is the link between them and the Law of Nations. It is through the medium of their nationality only that

¹ The organisation created by the Covenant of the League of Nations is another example. The rights and duties of the Council, the Assembly, and the Secretariat are neither international nor municipal rights and duties, but only rights and duties within the organisation set up by the Covenant.

² Westlake, *Papers*, p. 2, maintains that in these cases individuals appear as *subjects* of International Law ; but I cannot understand upon what argument this assertion is based. The correct standpoint is taken up by Lorimer, ii. p. 131, and Holland, *Jurisprudence*, p. 341.

individuals can enjoy benefits from the existence of the Law of Nations. This is a fact which has consequences over the whole area of International Law.¹ Such individuals as do not possess any nationality enjoy no protection whatever, and, if they are aggrieved by a State, they have no way of redress, since there is no State which would be competent to take their case in hand. As far as the Law of Nations is concerned, apart from morality, there is no restriction whatever to cause a State to abstain from maltreating to any extent such stateless individuals.² On the other hand, if individuals who possess nationality are wronged abroad, it is their home State only and exclusively which has a right to ask for redress, and these individuals themselves have no such right. It is for this reason that the question of nationality is very important for the Law of Nations, and that individuals enjoy benefits from this law, not as human beings, but as subjects of States which are members of the Family of Nations. Their position in this respect is so different from that of stateless individuals and of subjects of States outside the Family of Nations, that it has been correctly characterised as a kind of international 'indigenusness,' a *Völkerrechts-Indigenat*.³ Just as municipal citizenship procures for an individual the enjoyment of the benefits of the Municipal Laws, so this international 'indigenusness,' which is a necessary inference from municipal citizenship, procures the enjoyment of the benefits of the Law of Nations.

§ 292. Several writers⁴ maintain that the Law of Nations guarantees to every individual at home and abroad the so-called rights of mankind, whether he be stateless or not, and whether he be a subject of a member-State of the Family of Nations or not. Such rights are

Nationality the Link between Individuals and the Law of Nations.

The Law of Nations and the Rights of Mankind.

¹ See below, § 294.

² See below, § 312.

³ See Stoerk in *Holtzendorff*, ii. p. 588.

⁴ Bluntschli, §§ 360-363 and 370; Martens, i. §§ 85 and 86; Fiore, i. Nos. 684-712, and *Code*, Nos. 619-674; Bonfils, No. 397, and others.

said to comprise the right of existence, the right to protection of honour, life, health, liberty, and property, the right of practising the religion of his choice, the right of emigration, and the like. But such rights—they could only be municipal and not international rights—do not in fact at present enjoy any guarantee whatever from the Law of Nations.¹ But there are certain facts which cannot be denied at the background of this erroneous opinion. The Law of Nations is a product of Christian civilisation and represents a legal order which binds States, chiefly Christian, into a community. It is therefore no wonder that ethical ideas, some of which are the basis of, and others a development from Christian morals, have a tendency to require the help of International Law for their realisation. When the Powers stipulated at the Berlin Congress of 1878 that the Balkan States should be recognised only under the condition that they did not impose any religious disabilities on their subjects, or when in several treaties which constitute the resettlement after the World War the Principal Allied and Associated Powers secured the insertion of clauses to protect minorities, they lent their arm to the realisation of such an idea. Again, when the Powers after the beginning of the nineteenth century agreed to several international arrangements in the interest of the abolition of the slave trade,² they fostered

¹ The matter is treated with great lucidity by Heilborn, *System*, pp. 83-138.

² It is incorrect to maintain that the Law of Nations has abolished slavery, but there is no doubt that the conventional Law of Nations has tried to abolish the slave trade. Three important general treaties were concluded for that purpose during the nineteenth century, after the Vienna Congress—namely (1) the Treaty of London, 1841, between Great Britain, Austria, France, Prussia, and Russia; (2) the General

Act of the Congo Conference of Berlin, 1885, which in Article 9 dealt with the slave trade; (3) the General Act of the anti-slavery Conference of Brussels, 1890, which was signed by Great Britain, Austria-Hungary, Belgium, the Congo Free State, Denmark, France (see, however, below, § 517), Germany, Holland, Italy, Persia, Portugal, Russia, Spain, Sweden, Norway, the United States, Turkey, and Zanzibar. See Queneuil, *De la Traite des Noirs et de l'Esclavage* (1907), and Hershey, No. 216.

the realisation of another of these ideas. And the innumerable treaties between the different States as regards extradition of criminals, commerce, navigation, copyright, and the like, are inspired by the idea of affording ample protection to life, health, and property of individuals. Lastly, there is no doubt that, should a State venture to treat its own subjects or some of them with such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the Powers to exercise intervention¹ for the purpose of compelling such State to establish a legal order of things within its boundaries sufficient to guarantee to its citizens an existence more adequate to the ideas of modern civilisation. However, a guarantee of the so-called rights of mankind cannot be found in all these and other facts.

II

NATIONALITY

Vattel, i. §§ 220-226—Hall, §§ 66 and 87—Westlake, i. pp. 220, 238-240—Halleck, i. p. 401—Taylor, §§ 172-178—Hershey, No. 223—Moore, iii. §§ 372-376—Bluntschli, §§ 364-380—Stoerk in *Holtzendorff*, ii. pp. 630-650—Gareis, § 54—Liszt, § 11—Ullmann, §§ 108 and 109—Bonfils, Nos. 433-454—Despagnet, Nos. 329-333—Pradier-Fodéré, iii. No. 1645—Rivier, i. p. 303—Nys, ii. pp. 256-262—Calvo, ii. §§ 539-540—Fiore, i. Nos. 644-658, 684-712, and *Code*, Nos. 643-646—Martens, i. §§ 85-87—Hall, *Foreign Powers and Jurisdiction* (1894), § 14—Cogordan, *La Nationalité au Point de Vue des Rapports internationaux* (2nd ed, 1890)—Zeballos, *La Nationalité au Point de Vue de la Législation comparée*, etc., 2 vols. (1914)—Borchard, §§ 4 and 5, and 198-227—Gargas in *Z. V.*, v. (1911), pp. 278-316 and 478-509.

§ 293. Nationality of an individual² is his quality of being a subject of a certain State, and therefore its citizen. It is not for International, but for Municipal Law to determine who is, and who is not, to be considered a subject. And therefore it matters not, as far as the

Concep-
tion of
Nation-
ality.

¹ See above, § 137.

² The nationality of corporations is entirely a matter of private International Law, and considerations of

Law of Nations is concerned,¹ that Municipal Laws may distinguish between different kinds of subjects—for instance, those who enjoy full political rights, and are on that account named citizens, and those who are less favoured, and are on that account not named citizens. Nor does it matter that, according to Municipal Law, a person may be a subject of a part of a State, for instance of a dominion or a colony, but not a subject of the mother country, provided only such person appears as a subject of the mother country as far as the international relations of the latter are concerned. Thus, a person naturalised in a British dominion or colony is, for all international purposes, a British subject, although he may not have the rights of a British subject within the United Kingdom itself.² For all international purposes, all distinctions made by Municipal Laws between subjects and citizens, and between different kinds of subjects, have neither theoretical nor practical value, and the terms 'subject' and 'citizen' are, therefore, synonymous so far as International Law is concerned.

public policy have a decisive influence upon the attitude of every State with regard to it. See Isay, *Die Staatsangehörigkeit der juristischen Personen* (1907); Young, *Foreign Companies and other Corporations* (1912); Borchard, §§ 23 and 227-282 (exhaustive literature on the problem is to be found in Borchard's appendix). During the World War the problem became of particular importance, as is apparent from the following monographs: Pillet, *Des Personnes morales en Droit international privé* (1914); Schuster, *The Nationality and Domicile of Trading Corporations*, in vol. ii. (1917), pp. 57-85 of the Grotius Society; Mamelok, *Die Staatsangehörigkeit der juristischen Personen* (1918); Grossmann, *Wirtschaftspolitische Betrachtungen über die Staatsangehörigkeit der juristischen Personen* (1918); Ruegger, *Die Staatsangehörigkeit der juristischen Personen* (1918); Martin-

Achard, *La Nationalité des Sociétés anonymes* (1918).

¹ Unless the State concerned has restricted its liberty of action with regard to these questions by treaty with another State. See, for example, Treaty of Peace with Poland, Articles 3-6; Treaty of Peace with Austria, Articles 64-65. Similar provisions occur in other treaties of peace. See below, § 568h.

² *Rex v. Francis, ex parte Markwald*, [1918] 1 K.B. 617, and *Markwald v. A.G.*, (1920) 36 T.L.R. 197. See below, § 307, and Hall, *Foreign Powers and Jurisdiction*, § 20, who quotes, however, a decision of the French Cour de Cassation, according to which naturalisation in a British colony does not constitute a real naturalisation. But this decision is based on the Code Civil of France and has nothing to do with the Law of Nations. See also Westlake, i. pp. 238-240.

But it must be emphasised that 'nationality,' meaning citizenship of a certain State, must not be confounded with 'nationality' meaning membership of a certain nation in the sense of a race. Thus Englishmen, Scotsmen, and Irishmen are, despite their different nationality as regards their race, all of British nationality as regards their citizenship. Thus, further, although all Polish individuals are of Polish nationality *qua* race, for many generations there were no Poles *qua* citizenship.

§ 294. It will be remembered that nationality is the link between individuals and the benefits of the Law of Nations.¹ This function of nationality becomes apparent with regard to individuals abroad, or to property abroad belonging to individuals who are themselves within the territory of their home State, especially on account of one particular right and one particular duty of every State towards all other States. The right is that of protection over its citizens abroad which every State holds, and occasionally vigorously exercises towards other States; it will be discussed in detail below, § 319. The duty is that of receiving on its territory such of its citizens as are not allowed to remain² on the territory of other States. Since no State is obliged by the Law of Nations to allow foreigners to remain within its boundaries, it may, for many reasons, happen that certain individuals are expelled from all foreign countries. The home State of expelled persons cannot refuse to receive them on the home territory, the expelling States having a right to insist upon this.³

Function
of Nation-
ality.

§ 295. Although nationality alone is the regular means through which individuals can derive benefit

¹ See above, § 291.

² See below, § 326.

³ Apart from the right of protection, and the duty to receive expelled citizens at home, the powers of a State over its citizens abroad in consequence of its personal

supremacy illustrate the function of nationality. (See above, § 124.) Thus, the home State can tax citizens living abroad in the interest of home finance, can request them to come home for the purpose of rendering military service, can

So-called
Protégés
and *de*
facto Sub-
jects.

from the Law of Nations, there are three exceptions¹ in which individuals may come under the international protection of a State of which they are not subjects: (1) A State undertakes by an international agreement the diplomatic protection of another State's citizens abroad, and in this case the protected foreign subjects are named *protégés* of the protecting States. Such agreements may either be intended to be permanent — as when a small State, Switzerland for instance, has no diplomatic envoy in a certain foreign country where many of its subjects reside, or to be for time of war only, a belligerent handing over to a neutral State the protection of its subjects in an enemy State.

(2) The League of Nations, acting through a State or persons representing the League, undertakes the diplomatic protection abroad of persons who are not, of course, its citizens. Thus the Governing Commission of the Saar Basin, representing the League of Nations, is to ensure the protection abroad of the interests of the inhabitants of that territory.²

(3) A State promises diplomatic protection within the boundaries of Turkey and other Oriental countries to certain natives. Such protected natives are likewise named *protégés*, but they are also called '*de facto* subjects' of the protecting State. Their position is quite anomalous; it is based on custom and treaties, and no special rules of the Law of Nations itself are in existence concerning them. Every State which takes such *de facto* subjects under its protection can act according to its discretion, and there is no doubt that as soon as these Oriental States have reached a level of civilisation equal to that of the Western members

punish them for crimes committed abroad, can categorically request them to come home for good (so-called *jus avocandi*). And no State has a right forcibly to retain foreign citizens called home by their home

State, or to prevent them from paying taxes to their home State, and the like.

¹ See Borchard, §§ 203-205.

² See Treaty of Peace with Germany, Article 50 annex.

of the Family of Nations, the whole institution of *de facto* subjects will disappear.

§ 296. As emigration involves the voluntary removal of an individual from his home State with the intention of residing abroad, but not necessarily with the intention of renouncing his nationality, it is obvious that emigrants may well retain their nationality. Emigration is in fact entirely a matter of internal legislation of the different States. Every State can fix for itself the conditions under which emigrants lose or retain their nationality, as it can also prohibit emigration altogether, or can at any moment request those who have emigrated to return to their former home, provided the emigrants have retained their nationality of birth. And it must be specially emphasised that the Law of Nations does not, and cannot, grant a right of emigration to every individual, although it is frequently maintained¹ that it is a 'natural' right of every individual to emigrate from his own State.² What would be possible, and is desirable, is that by a general international treaty concerning the acquisition and loss of citizenship the several States should agree to grant to every individual by their Municipal Laws the right to emigrate.³

Nationality and Emigration.

¹ Especially by American writers. On the American standpoint concerning emigration, see Borchard, §§ 315-331.

² Attention ought to be drawn to the fact that, to ensure the protection of the interests of emigrants and immigrants from the moral, hygienic, and economic point of view, the Institute of International Law, at its meeting at Copenhagen in 1897, adopted a body of fourteen principles concerning emigration under the heading 'Vœux relatifs à la Matière de l'Emigration'; see *Annuaire*, xvi.

(1897), p. 276. See also Gargas in *Z. V.*, v. (1911), pp. 278-316, 478-509.

³ In accordance with Article 56 of the Treaty of Peace with Bulgaria, and the decision of the Principal Allied and Associated Powers, Greece and Bulgaria signed, on November 27, 1919, a convention providing that the subjects of each party belonging to racial, religious and linguistic minorities might freely emigrate to the territory of the other. *Misc.*, No. 3 (1920), Cmd. 589. Other similar treaties are believed to be under consideration.

III

MODES OF ACQUIRING AND LOSING NATIONALITY

Vattel, i. §§ 212-219—Hall, §§ 67-72—Westlake, i. pp. 220-227—Lawrence, §§ 94-95—Halleck, i. pp. 430-448—Hershey, Nos. 224-229—Moore, iii. §§ 372-473—Taylor, §§ 176-183—Walker, § 19—Bluntschli, §§ 364-373—Hartmann, § 81—Heffter, § 59—Stoerk in *Holtzendorff*, ii. pp. 592-630—Gareis, § 55—Liszt, § 11—Ullmann, §§ 110 and 112—Bonfils, Nos. 417-432—Despagnet, Nos. 318-327—Pradier-Fodéré, iii. Nos. 1646-1691—Rivier, i. pp. 303-306—Calvo, ii. §§ 541-654, vi. §§ 92-117—Martens, ii. §§ 44-48—Fiore, *Code*, Nos. 665-674—Foote, *Private International Jurisprudence* (3rd ed. 1904), pp. 1-51—Dicey, *Conflict of Laws*, 2nd ed. (1908), pp. 164-191—Martitz, *Das Recht der Staatsangehörigkeit im internationalen Verkehr* (1885)—Cogordan, *La Nationalité*, etc. (2nd ed. 1890), pp. 21-113, 317-398—Lapradelle, *De la Nationalité d'Origine* (1893)—Berney, *La Nationalité à l'Institut de Droit international* (1897)—Bisocchi, *Acquisto e Perdita della Nazionalità*, etc. (1907)—Sieber, *Das Staatsbürgerecht in internationalem Verkehr*, 2 vols. (1907)—Lehr, *La Nationalité dans les principaux États du Globe* (1909), and in *R.I.*, 2nd Ser. x. (1908), pp. 285, 401, and 525—Edwards in the *Journal of the Society of Comparative Legislation*, New Ser. xv. pt. ii. pp. 108-115—Borchard, §§ 263-273, and 315-336—In 1893 the British Government addressed a circular to its representatives abroad requesting them to send in a report concerning the laws relating to nationality and naturalisation in force in the respective foreign countries. These reports have been collected and presented to Parliament and are continued from time to time. The reports up to 1893 are printed in Martens, *N.R.G.*, 2nd Ser. xix. pp. 515-760.

Five
Modes of
Acquisition
of
Nationality.

§ 297. Although it is at present for Municipal Law to determine who is, and who is not, a subject of a State,¹ it is nevertheless of interest to the theory of the Law of Nations to ascertain how nationality can be acquired according to the Municipal Law of the different States. The reason of the thing presents five possible modes of acquiring nationality, and, although no State is obliged to recognise all five, nevertheless all States practically do so. They are birth, naturalisation, redintegration, subjugation, and cession.

§ 298. The first and chief mode of acquiring nationality is by birth; indeed, the acquisition of nationality

¹ Except in the case mentioned in § 293 n.

by another mode is exceptional, since the vast majority of mankind acquires nationality by birth, and does not change it afterwards. But no uniform rules exist according to the Municipal Law of the different States concerning this matter. Some States, as Germany and Austria, adopted the rule that descent alone is the decisive factor,¹ so that a child born of their subjects became *ipso facto* by birth their subject likewise, be the child born at home or abroad. According to this rule, illegitimate children acquire the nationality of their mother. Other States, such as Argentina, have adopted the rule that the territory on which birth occurs is exclusively the decisive factor.² According to this rule, every child born on the territory of such State, whether the parents be citizens or aliens, becomes a subject of such State, whereas a child born abroad is foreign, although the parents may be subjects. Again, other States, as Great Britain³ and the United States, have adopted a mixed principle, since, according to their Municipal Law, not only children of their subjects born at home or abroad become their subjects, but also such children of alien parents as are born on their territory.

Acquisition of Nationality by Birth.

§ 299. The most important mode of acquiring nationality besides birth is that of naturalisation in the wider sense of the term. Through naturalisation, an alien by birth acquires the nationality of the naturalising

¹ *Jus sanguinis*.

² *Jus soli*.

³ The Common Law of England concerning nationality has several times been altered by Statute. According to § 1 of the British Nationality and Status of Aliens Acts, 1914 and 1918, every person is a natural-born British subject who (a) was born within His Majesty's Dominions and Allegiance; (b) though born out of His Majesty's Dominions, is the child of a father who at the time of the child's birth was a British subject, and was either born within His Majesty's

Allegiance, or was a person to whom a certificate of naturalisation had been granted, or had become a British subject through annexation of territory, or was in the service of the Crown when the child was born; (c) was born on board a British ship. See, however, § 1 (3) as to the status of a person born before January 1, 1915. See Hall, *Foreign Powers and Jurisdiction* (1894), § 14; Edwards and Sargent in the *Journal of the Society of Comparative Legislation*, New Ser. xiv. (1914), pp. 314-336; Wilkinson in the *Law Magazine and Review*, xl. (1915-1916), pp. 187-195.

Acquisition of Nationality through Naturalisation.

State. According to the Municipal Law of the different States naturalisation may take place through six different acts—namely, marriage, legitimation, option, acquisition of domicile, appointment as Government official, grant on application. Thus, according to the Municipal Law of most States, an alien female marrying a subject of such State becomes thereby *ipso facto* naturalised. Thus, further, according to the Municipal Law of several States, an illegitimate child born of an alien mother, and therefore an alien itself, becomes *ipso facto* naturalised through the father marrying the mother, and thereby legitimating the child.¹ Thus, thirdly, according to the Municipal Law of some States, which declare children of foreign parents born on their territory to be aliens, such children, if, after having come of age, they make a declaration that they intend to be subjects of the country of their birth, become *ipso facto* by such option naturalised. Again, fourthly, some States, such as Venezuela, let an alien become naturalised *ipso facto* by his taking up his domicile² on their territory. Some States, fifthly, let an alien become naturalised *ipso facto* on appointment as a Government official. And, lastly, in all States naturalisation may be procured through a direct act on the part of the State granting nationality to an alien who has applied for it. This last kind of naturalisation is naturalisation in the narrower sense of the term; it is the most important for the Law of Nations, and, whenever one speaks of naturalisation pure and simple, such naturalisa-

¹ English law has not adopted this rule.

² It is doubtful (see Hall, § 64) whether the home State of individuals so naturalised against their will must submit to this *ipso facto* naturalisation. See above, § 125, where the rule has been stated that in consideration of the personal supremacy of the home State over its citizens

abroad no State can naturalise foreigners against their will. For the same reason objection must be taken to the law of some American States according to which (see Borchard, § 232) naturalisation is *ipso facto* acquired through a foreigner buying real estate, or having a child born to him, in the State concerned.

tion through direct grant on application is meant ; it will be discussed in detail below, §§ 303-307.

§ 300. The third mode of acquiring nationality is by so-called redintegration or resumption. Such individuals as have been natural-born subjects of a State, but have lost their original nationality through naturalisation abroad or for some other cause, may recover their original nationality on fulfilling certain conditions. This is called redintegration or resumption, in contradistinction to naturalisation, the favoured person being redintegrated and resumed into his original nationality. Thus, according to § 12 (2) of the British Nationality and Status of Aliens Act, 1914, any child who has ceased to be a British subject through its father ceasing to be a British subject, may, within one year after attaining its majority, by a declaration resume its original British nationality. Again, according to § 2 (5), a woman who was a British subject previously to her marriage to an alien, and whose husband has died or whose marriage has been dissolved, may immediately upon the happening of such an event apply for a certificate of naturalisation readmitting her to British nationality.

Acquisition of Nationality through Redintegration.

§ 301. The fourth and fifth modes of acquiring nationality are by subjugation after conquest and by cession of territory, the inhabitants of the subjugated and the ceded territory acquiring *ipso facto* by the subjugation or cession the nationality of the State which acquires the territory. These modes of acquisition of nationality are modes settled by the customary Law of Nations ; details have been given above, §§ 219 and 240.

Acquisition of Nationality through Subjugation and Cession.

§ 302. Although it is at present left in the discretion of the different States to determine the grounds on which individuals lose their nationality, it is nevertheless of interest to the theory of the Law of Nations to

Five Modes of losing Nationality.

take notice of these grounds. Five modes of losing nationality must be stated to exist according to the reason of the thing, although all five are by no means recognised by all the States. These modes are release, deprivation, expiration, option, and substitution.

(1) *Release*.—Some States, as Germany, give their citizens the right to ask to be released from their nationality. Such release, if granted, denationalises the released individual.

(2) *Deprivation*.—For example, according to the Municipal Law of some States, as, for instance, Bulgaria, Greece, Italy, Holland, Portugal, and Spain, the fact that a citizen enters into foreign civil or military service without permission of his sovereign deprives him of his nationality.

(3) *Expiration*.—Some States have legislated that citizenship expires in the case of such of their subjects as have left the country and stayed abroad a certain length of time. For instance, a naturalised citizen of the United States of America as a rule loses his citizenship by residing for two years in the country of his origin or for five years in any other foreign State. Or, again, the American citizenship of a woman who acquired it by marriage to an American expires in case she is living abroad at the time when her husband dies or her marriage is dissolved, unless within one year after such an event she registers as an American citizen before the United States consul.

(4) *Option*.—For example, some States—Great Britain for instance¹—which declare a child born of foreign parents on their territory to be their natural-born subject, although he becomes at the same time, according to the Municipal Law of the home State of the parents, a subject of such State, give the right to such child to make, after coming of age, a declaration that

¹ See British Nationality and Status of Aliens Act, 1914, § 14.

he desires to cease to be a citizen.¹ Or, to give another example, according to the law of the United States, a foreign woman who became an American citizen by marriage to an American can, if she continues to reside in the United States after the termination of the marital relationship, renounce her American citizenship by a declaration. Such declaration of alienage creates *ipso facto* the loss of nationality.

(5) *Substitution*.—According to the law of many States, as, for instance, Great Britain, the nationality of their subjects is extinguished *ipso facto* by their naturalisation abroad, be it through marriage, grant on application, or otherwise. Some States, however, do not object to their citizens acquiring another nationality besides that which they already possess.

Just as naturalisation abroad *ipso facto* extinguishes the nationality of their subjects according to the Municipal Law of some States, so, according to International Law, through subjugation or cession, the inhabitants of the conquered or ceded territory become subjects of the State which annexes the territory, and their former nationality is extinguished by substitution of the new.²

IV

NATURALISATION IN ESPECIAL

Vattel, i. § 214—Hall, §§ 71-71*—Westlake, § i. pp. 232-237—Lawrence, §§ 95-96—Phillimore, i. §§ 325-332—Halleck, i. pp. 432-443—Taylor, §§ 181-182—Walker, § 19—Wharton, ii. §§ 173-186—Moore, iii. §§ 377-380—Wheaton, § 85—Hershey, Nos. 230-234—Bluntschli, §§ 371-372—Ullmann, §§ 110-111—Pradier-Fodéré, iii. Nos. 1656-1659—Calvo, ii. §§ 581-646—Martens, ii. §§ 47-48—Stoicesco, *Étude sur la Naturalisation* (1875)—Folleville, *Traité de la Naturalisation* (1880)—Cogordan, *La*

¹ But this option cannot be exercised in time of war so as to make the declarant an enemy. *Rex v. Commanding Officer*, etc., (1917) 33 T.L.R. 252.

² See above, § 301. Concerning the option sometimes given to inhabitants of ceded territory to retain their former nationality, see above, § 219.

Nationalité, etc. 2d ed. 1890), pp. 117-282, 307-312—Dellénille, *De la Naturalisation* (1893)—Henriques, *The Law of Aliens*, etc. (1906), pp. 91-121—Piggott, *Nationality and Naturalisation*, etc., 2 vols. (new ed. 1907)—Ekdassari, *La Naturalizzazione* (1912)—Borchard, §§ 228-252, and 263-272—Hart, Edwards, Sargent and Phillimore in the *Journal of the Society of Comparative Legislation*, New Ser. ii. (1900), pp. 11-26; xiv. (1914), pp. 314-336, and xvii. (1917), pp. 165-171—Wilkinson in the *Law Magazine and Review*, xl. (1915-16), pp. 187-195—Edwards in the *Law Quarterly Review*, xxx. (1914), pp. 433-447.

Concep-
tion and
Import-
ance of
Naturali-
sation.

§ 303. Naturalisation in the narrower sense of the term—in contradistinction to naturalisation *ipso facto* through marriage, legitimation, option, domicile, and Government office (see above, § 299)—must be defined as reception of an alien into the citizenship of a State through a formal act on application of the favoured individual. International Law does not at present provide any rules for such reception, but it recognises the natural competence of every State, as a sovereign, to increase its population through naturalisation, although a State might by its Municipal Law be prevented from making use of this natural competence.¹ In spite, however, of the fact that naturalisation is at present still a domestic affair of the different States, it is nevertheless of special importance to the theory and practice of the Law of Nations. This is the case because naturalisation is effected through a special grant of the naturalising State, and regularly involves either a change or a multiplication of nationality, facts which can be, and have been, the source of grave international conflicts. In the face of the fact that millions of citizens emigrate every year from their home countries with the intention of settling permanently in foreign countries, where the majority of them become sooner or later naturalised, the international importance of naturalisation cannot be denied.

¹ But there is, as far as I know, no civilised State in existence which

abstains altogether from naturalising foreigners.

§ 304. The object of naturalisation is always an alien. Object of Naturalisation. Some States will naturalise such aliens only as are Stateless because they never have been citizens of another State or because they have renounced, or have been released from, or deprived of, the citizenship of their home State. But other States, as Great Britain, naturalise also such aliens as are, and remain, subjects of their home States. Most States naturalise such person only as has taken up his domicile in their country, has been residing there for some length of time, and intends permanently to remain in their country. And according to the Municipal Law of many States, naturalisation of a married individual includes that of his wife and of his children under age.¹ But although every alien may be naturalised, no alien has, according to the Municipal Law of most States, a claim to become naturalised, naturalisation being a matter of discretion for the Government, which can refuse it without giving any reasons.

§ 305. If granted, naturalisation makes an alien a citizen. Conditions of Naturalisation. But it is left to the discretion of the naturalising State to grant naturalisation upon any conditions it likes. And it must be specially mentioned that naturalisation need not give an alien absolutely the same rights as are possessed by natural-born citizens. Thus according to Article 2 of the Constitution of the United States of America a naturalised alien can never be elected President.² However, according to § 3 of the British Nationality and Status of Aliens Act, 1914, a naturalised British subject is entitled (subject to the provisions of this Act) to all rights, powers, and

¹ According to § 5 of the British Nationality and Status of Aliens Act, 1914, the children born before the grant of a certificate of naturalisation to an alien do not become British subjects unless their names are included in the certificate.

² A foreigner naturalised in Great Britain by letters of denization does not acquire the same rights as a natural-born British subject. See Hall, *Foreign Powers and Jurisdiction* (1894), § 22.

privileges to which a natural-born British subject is entitled.

Effect of
Naturali-
sation
upon
Previous
Citizen-
ship.

§ 306. Since the Law of Nations does not at present comprise any rules concerning naturalisation, the effect of naturalisation upon previous citizenship is exclusively a matter for the Municipal Law of the States concerned. Some States, as Great Britain,¹ have legislated that one of their subjects becoming naturalised abroad thereby loses his previous nationality; but other States have not done this. Be that as it may, there can be no doubt that a person who is naturalised abroad, and temporarily or permanently returns to the country of his origin, can be held responsible² for all acts done there at the time before his naturalisation abroad.³ The British Nationality and Status of Aliens Act, 1914, expressly provides, in § 16, that a British subject who ceases to be a British subject shall not thereby be discharged from any obligation, duty, or liability in respect of any act done before he ceased to be a British subject.

Naturali-
sation
in Great
Britain.

§ 307. The present law of Great Britain⁴ concerning naturalisation is mainly contained in the British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. v. c. 17), as amended by the British Nationality and Status of Aliens Act, 1918 (8 & 9 Geo. v. c. 38). According to § 2 of the principal Act, an alien may, upon application, become naturalised by the grant of a certificate of naturalisation if he fulfils the following con-

¹ Up to the Naturalisation Act of 1870, Great Britain upheld the rule *nemo potest exuere patriam*. Its antithesis is the rule *ne quis invitus civitate mutetur, neve in civitate maneat invitus* (Cicero, 'Pro Balbo,' c. 13, § 31; see Rattigan, *Private International Law* (1895), p. 29, No. 21).

² Many instructive cases concerning this matter are reported by Wharton, ii. §§ 180 and 181, and Moore, iii. §§ 401-407. See also Hall, § 71, where details concerning the practice of many States are

given with regard to their subjects naturalised abroad.

³ That a British subject who, after the outbreak of hostilities, becomes naturalised in an enemy country, commits an act of treason was decided in *Rex v. Lynch*, [1903] 1 K.B. 444. See also below, vol. ii. § 101.

⁴ See M'Nair in the *Law Quarterly Review*, xxxv. pp. 213-220. As regards naturalisation in the United States of America, see Moore, iii. §§ 381-389, and Dyne, *Naturalisation in the United States* (1907).

ditions : He must have resided in the United Kingdom for not less than one year immediately preceding his application, and previously for four years within the last eight years before his application either in the United Kingdom or in some other part of the British dominions. Equivalent to such residence is service under the Crown for not less than five years within the last eight years before the application. Moreover, under the Amending Act, a period spent in the service of the Crown may, if the Secretary of State thinks fit, be treated as equivalent to a period of residence in the United Kingdom. The applicant must be of good character, must have an adequate knowledge of the English language, and must intend, if his application is granted, either to reside within the British dominions or to enter or continue in the service of the Crown. The grant of a certificate of naturalisation is within the absolute discretion of the Secretary of State. A certificate does not take effect until the applicant has taken an oath of allegiance.

Part of the period of residence, or even the whole of it, may be dispensed with in certain cases. Thus, as was stated above, § 300, a woman who was a British subject before her marriage with an alien, may, if the marriage has been dissolved or her husband has died, be at once readmitted to British nationality without any requirement as to previous residence. Further, in any other special case—§ 2 does not define the special case, but leaves the matter entirely to the discretion of the authorities—a certificate of naturalisation may be granted to an applicant who has resided within the United Kingdom for one year immediately preceding the application and for four additional years in some part of His Majesty's dominions, or has served five years under the Crown, although the four additional years of residence or the term of service under the

Crown were not within the last eight years before the application. Again, in any special case, under § 5 (ii.) (as amended), a certificate of naturalisation may be granted to any minor whether or not the conditions required by the Act have been complied with.¹

According to § 4, a special certificate of naturalisation may be granted to any person with respect to whose nationality as a British subject a doubt exists, and it may be specified in the certificate that it has been granted for the purpose of quieting doubts as to the right of the person to be a British subject. The grant of such a certificate is not to be deemed an admission that the person to whom it has been granted was not previously a British subject.

Naturalisation of an alien includes that of his wife (§ 10), but does not include naturalisation of any child born before the application unless its name is mentioned in the certificate. Any child so named may, within one year after attaining its majority, divest itself of its British nationality by making a declaration of alienage (§ 5).

A certificate of naturalisation is to be revoked under § 7 (as amended), when the Secretary of State is satisfied (a) that it was obtained by false representation or fraud, or by concealment of material circumstances, or (b) that the person to whom the certificate was granted has shown himself by act or speech to be disaffected or disloyal to His Majesty. It is also to be revoked if the Secretary of State is satisfied that the holder (c) during any war in which Great Britain is engaged, has unlawfully traded or communicated with the enemy or his subjects, or has been associated with any business which is to his knowledge carried on in such manner as to assist the enemy,

¹ As to the grant of certificates of naturalisation to subjects of States which were enemies of Great Britain

during the World War, see § 3 (2) of the Amending Act.

or (d) within five years of the date of the grant of the certificate has been sentenced by a court in the British dominions to not less than twelve months' imprisonment, or to penal servitude, or to a fine of not less than £100, or (e) was not of good character at the date of the grant of the certificate, or (f) has since that date been for not less than seven years ordinarily resident out of the British dominions, otherwise than as a representative of a British business or an institution established within the British Empire or in the service of the Crown, and has not maintained substantial connection with the British dominions, or (g) according to the law of a State at war with Great Britain, remains a subject of that State, and (in cases (c) to (g)) that the continuance of the certificate is not conducive to the public good.¹ When a certificate of naturalisation is revoked, the Secretary of State may, as a rule,² direct that the wife and children under age of the person whose certificate is so revoked, are to cease to be British subjects; but if no such direction is given, the wife and children under age remain British subjects unless the wife makes a declaration of alienage.

According to § 8 of the Act, the Government of any British possession has the same power to grant or revoke a certificate of imperial naturalisation as the Government of the United Kingdom; but, except in the case of Canada, Australia, New Zealand, South Africa, Newfoundland, and India, any certificate of imperial naturalisation to be granted by a British possession must first be submitted for the approval of the Secretary of State. However, neither the provisions of the Act regarding naturalisation nor any certificate granted thereunder are to be effective in any of the

¹ As to revocation of certificates granted during the World War to a former subject of a State then at war with Great Britain, see § 3 (1) of the

Amending Act.

² As to the exception, see § 7a (1b) of the Amending Act.

self-governing British dominions which do not adopt them (§ 9). These dominions may legislate on their own account concerning local naturalisation, in contradistinction to imperial naturalisation, and aliens locally naturalised within a British dominion according to local laws are for all international purposes subjects of the British Crown, although such naturalisation does not make them British subjects in the United Kingdom.¹

Where Great Britain has entered into a convention with a foreign State to the effect that the subjects of such State who have been naturalised in Great Britain may divest themselves of their status as British subjects, such naturalised British subjects may, within the limit of time provided by the convention, through a declaration of alienage, shake off their acquired British nationality (§ 15).

Not to be confounded with naturalisation proper is naturalisation through *denization* by means of letters patent under the Great Seal. It is expressly provided by § 25 of the British Nationality and Status of Aliens Act, 1914, that nothing in this Act shall affect the grant of letters of denization by His Majesty. This way of making an alien a British subject is based on a very ancient practice² which has not yet become obsolete. Such denization requires no previous residence within the United Kingdom. 'A person may be made a denizen without ever having set foot upon British soil. There have been, and from time to time there no doubt will be, persons of foreign nationality to whom it is wished to entrust functions which can only be legally exercised by British subjects. In such instances, the condition of five years' residence in the United Kingdom would generally be prohibitory. The difficulty can be avoided by the issue of letters of denization; and it is believed that on one or two

¹ See above, § 293.

² See Hall, *Foreign Powers and Jurisdiction*, § 22.

occasions letters have in fact been issued with the view of enabling persons of foreign nationality to exercise British consular jurisdiction in the East' (Hall).

V

DOUBLE AND ABSENT NATIONALITY

Hall, §§ 71 and 74—Westlake, i. pp. 228-232—Lawrence, § 96—Halleck, i. pp. 440-443—Taylor, § 183—Wheaton, § 85 (Dana's Note)—Moore, iii. §§ 426-430—Bluntschli, §§ 373-374—Hartmann, § 82—Heffter, § 59—Stoerk in *Holtzendorff*, ii. pp. 650-655—Ullmann, § 110—Bonfils, No. 422—Pradier-Fodéré, iii. Nos. 1660-1665—Rivier, i. pp. 304-306—Calvo, ii. §§ 647-654—Martens, ii. § 46—Borchard, §§ 11 and 253-262—Bodmann in the *Archiv für öffentliches Recht*, xii. (1897), pp. 200 and 317—Editorial comment in *A.J.*, ix. (1915), pp. 942-948.

§ 308. As the Law of Nations has at present no rules concerning acquisition and loss of nationality beyond this, that nationality is lost and acquired through subjugation and cession, and as the Municipal Laws of the different States differ in many points concerning this matter, the necessary consequence is that an individual may possess more than one nationality as easily as none at all. The points to be discussed here are therefore: How double nationality occurs; the position of individuals with double nationality; how absent nationality occurs; the position of individuals destitute of nationality; and, lastly, means of redress against difficulties arising from double and absent nationality.

Possibility of Double and Absent Nationality.

It must, however, be specially mentioned that the Law of Nations is concerned with such cases only of double and absent nationality as are the consequences of conflicting Municipal Laws of several absolutely different States. Such cases as are the consequence of the Municipal Laws of a Federal State, or of a State which, as Great Britain, allows outlying parts to legislate on their own account concerning naturalisation, fall outside the scope of the Law of Nations. For, inter-

nationally, such individuals appear as subjects of such Federal State or the British Empire, whatever their position may be inside these States.

How
Double
Nation-
ality
occurs.

§ 309. An individual may own double nationality knowingly or unknowingly, and with or without intention. And double nationality may be produced by every mode of acquiring nationality. Even birth can vest a child with double nationality. Thus, every child born in Great Britain and of German parents acquires at the same time British and German nationality, for such child is British according to British, and German according to German Municipal Law. Double nationality can likewise be the result of marriage. Thus, a Venezuelan woman marrying an Englishman acquires according to British law British nationality, but according to Venezuelan law she does not lose her Venezuelan nationality. Legitimation of illegitimate children can produce the same effect. Thus, an illegitimate child of a German born in England of an English mother is a British subject according to British and German law, but if after the birth of the child the father marries the mother and remains a resident in England, he thereby legitimates the child according to German law, and such child acquires thereby German nationality without losing its British nationality, although the mother does lose her British nationality. It is not necessary to give examples of double nationality caused by option, taking domicile abroad, accepting foreign Government office, and redintegration, and it suffices merely to draw attention to the fact that naturalisation in the narrower sense of the term is frequently a cause of double nationality, since individuals may apply for, and receive, naturalisation in a State without thereby losing the nationality of their home State. Peculiar cases of double nationality are made possible by § 10 of the British Nationality and Status of Aliens Act, 1914

(as amended by the Act of 1918), according to which the wife of a British subject who becomes an alien may by a declaration maintain her British nationality, and a British-born wife of an alien who is a subject of a State at war with Great Britain, may be allowed to resume British nationality if the Secretary of State is satisfied that this is desirable.

§ 310. Individuals owning double nationality bear, in the language of diplomatists, the name *sujets mixtes*. The position of such 'mixed subjects' is awkward on account of the fact that two different States claim them as subjects, and therefore claim their allegiance. In case a serious dispute arises between these two States which leads to war, an irreconcilable conflict of duties is created for these unfortunate individuals. It is all very well to say that such conflict is a personal matter, which concerns neither the Law of Nations nor the two States in dispute. As far as an individual has, through naturalisation, option, and the like, acquired his double nationality, one may say that he has placed himself in that awkward position by intentionally and knowingly acquiring a second nationality without being released from his original nationality. But those who are natural-born *sujets mixtes* in most cases do not know it before they have to face the conflict, and their difficult position is not their own fault.

Position
of Indi-
viduals
with
Double
Nation-
ality.

Be that as it may, there is no doubt that each of the States claiming such an individual as subject is internationally competent to do this, although they cannot claim him against one another, since each of them correctly maintains that he is its subject.¹ But against third States each of them appears as his sovereign,

¹ I cannot agree with the statement in its generality made by Westlake, i. p. 228: 'If, for instance, a man, claimed as a national both by the United Kingdom and by another country, should contract in

the latter a marriage permitted by its laws to its subjects, an English court would have to accept him as a married man.' If this were correct, the marriage of a German who, without having given up his German

and it is therefore possible that each of them can exercise its right of protection over him within third States. On the other hand, a third State can treat an individual possessing two nationalities as a subject of either of the two States to which he owes allegiance. Thus an Austrian by birth who had become naturalised in Chili, but had not thereby lost his Austrian nationality, and who had become resident in England, was compelled to register in England as an alien enemy at the outbreak of the World War.

How
Absent
Nation-
ality
occurs.

§ 311. An individual may be destitute of nationality knowingly or unknowingly, intentionally or through no fault of his own. Even by birth a person may be Stateless. Thus, an illegitimate child born in Germany of an English mother is actually destitute of nationality, because according to German law it does not acquire German nationality, and according to British law it does not acquire British nationality. Thus, further, all children born in Germany of parents who are destitute of nationality are themselves, according to German law, Stateless. But Statelessness may take place after birth. All individuals who have lost their original nationality without having acquired another are, in fact, destitute of nationality.

§ 312. That Stateless individuals are objects of the Law of Nations in so far as they fall under the territorial supremacy of the State on whose territory they live, there is no doubt. But since they do not own a

citizenship, has become naturalised in Great Britain and has afterwards married his niece in Germany, would have to be recognised as legal by the English courts. The correct solution seems to me to be that such marriage is legal in Germany, but not legal in England, because British law does not permit marriage between uncle and niece. The case is different when a German who marries his niece in Germany afterwards takes

his domicile and becomes naturalised in England; in this case the English courts would have to recognise the marriage as legal because German law does not object to a marriage between uncle and niece, and because the marriage was concluded before the man took his domicile in England and became a British subject. See Foote, *Private International Jurisprudence*, 3rd ed. (1904), p. 106, and the cases there cited.

nationality, the link¹ by which they could derive benefits from International Law is missing, and thus they lack protection as far as this law is concerned. Their position may be compared to vessels on the open sea not sailing under the flag of a State, which likewise do not enjoy any protection. In practice, Stateless individuals are in most States treated more or less as though they were subjects of foreign States, but however much they are maltreated,² International Law³ cannot aid them.

Position of Individuals destitute of Nationality.

§ 313. Double, as well as absent, nationality of individuals has from time to time created many difficulties for the States concerned. As regards the remedy for such difficulties, it is comparatively easy to meet those created by absent nationality. If the number of Stateless individuals increases much within a certain State, the latter can require them to apply for naturalisation or to leave the country; it can even naturalise them by Municipal Law against their will, as no other State will, or has a right to, interfere, and as, further, the very fact of the existence of individuals destitute of nationality is a blemish in Municipal, as well as in International Law. Much more difficult is it, how-

Redress against Difficulties arising from Double and Absent Nationality.

¹ See above, § 291.

² It cannot be considered maltreatment if a State compels individuals destitute of nationality either to become naturalised or to leave the country. See below, § 313.

³ The position of the Jews in Roumania before 1919 furnished a sad example. According to Municipal Law they were, with a few exceptions, considered as foreigners for the purpose of avoiding the consequences of Article 44 of the Treaty of Berlin, 1878, according to which no religious disabilities were to be imposed by Roumania upon her subjects. But as these Jews were not subjects of any other State, Roumania compelled them to render military service, and actually treated

them in every way according to discretion without any foreign State being able to exercise a right of protection over them. See Rey in *R.G.*, x. (1903), pp. 460-526; Bar in *R.I.*, 2nd Ser. ix. (1907), pp. 711-716; Stambler, *L'Histoire des Israélites Roumains et le Droit d'Intervention* (1913); Kohler and Wolf, *Jewish Disabilities in the Balkan States* (1916). See also above, § 293. But on December 9, 1919, Roumania undertook by a treaty with the Principal Allied and Associated Powers (Treaty Ser. (1920), No. 6, Cmd. 588), to recognise as Roumanian subjects *ipso facto* and without any formality Jewish inhabitants who were Stateless.

ever, to find, within the limits of the present rules of the Law of Nations, means of redress against conflicts arising from double nationality. Very grave disputes indeed have occasionally occurred between States on account of individuals who were claimed as subjects by both sides. Thus, in 1812, a time when England still kept to her old rule that no natural-born English subject could lose his nationality, the United States went to war with England because—apart from other reasons—the latter impressed Englishmen naturalised in America from on board American merchantmen, claiming the right to do so, as according to her law these men were still English citizens. Thus, further, Prussia frequently had disputes with the United States during the sixties of the last century on account of Prussian individuals who, without having rendered military service at home, had emigrated to America to become naturalised there, and had afterwards returned to Prussia.¹ Again, during

¹ The cases of *Martin Koszta* and of *August Piepenbrink* ought here to be mentioned :

(1) Koszta was a Hungarian subject who took part in the revolutionary movement of 1848, escaped to the United States, and in July 1852 made a declaration under oath, before a proper tribunal, of his intention to become naturalised there. After remaining nearly two years in the United States, but before he was really naturalised, he visited Turkey, and obtained a *tezkereli*, a kind of letter of safe conduct, from the American chargé d'affaires at Constantinople. Later on, while at Smyrna, he was seized by Austrian officials and taken on board an Austrian man-of-war with the intention of bringing him to Austria, to be there punished for his part in the revolution of 1848. The American consul demanded his release, but Austria maintained that she had a right to arrest Koszta according to treaties between her and Turkey. Thereupon the American man-of-war *Saint Louis* threatened

to attack the Austrian man-of-war in case she would not give up her prisoner, and an arrangement was made that Koszta should be delivered into the custody of the French consul at Smyrna until the matter was settled between the United States and Austrian Governments. Finally, Austria consented to Koszta being brought back to America. Although Koszta was not yet naturalised, the United States claimed a right of protection over him, since he had taken up his domicile on her territory with the intention of becoming naturalised there in due time, and had thereby in a sense acquired the national character of an American. See Wharton, ii. § 175; Moore, iii. §§ 490-491; Martens, *Causées célèbres*, v. pp. 583-599; Borchard, § 250.

(2) August Piepenbrink was a German subject who had emigrated to America, and in 1910 had filed his declaration of intention to become naturalised. In November 1914, before he was naturalised, and at a time when the Allied Powers were taking all enemy subjects of military

the time of the revolutionary movements in Ireland in the last century before the Naturalisation Act of 1870 was passed, disputes arose between Great Britain and the United States on account of such Irishmen as took part in these revolutionary movements after having become naturalised in the United States.¹ It would seem that the only way in which all the difficulties arising from double and absent nationality could really be done away with would be for all the Powers to agree upon an international convention, according to which they undertook the obligation of enacting by their Municipal Law such corresponding rules regarding acquisition and loss of nationality as made the very occurrence of double and absent nationality impossible.²

age from neutral vessels for the purpose of making them prisoners of war (see below, vol. ii. § 413), Piepenbrink was a waiter on the American vessel *Windber*. The United States was at that time neutral. The *Windber* was stopped on the high seas by the French cruiser *Condé*; Piepenbrink was taken off, brought to Jamaica, and there handed over to the British authorities. The United States Government demanded his release from the French as well as the British Government. This was at first refused, because he was not a naturalised American citizen; but as the United States Government insisted, the British and French Governments decided to liberate him 'as a friendly act, while reserving the question of principle involved.' See *A.J.*, ix. (1915), Supplement, pp. 353-360.

¹ The United States has, through the so-called 'Bancroft Treaties,' attempted to overcome conflicts arising from double nationality. The first of these treaties was concluded in 1868 with the North German Confederation, the precursor of the German Empire, and signed on behalf of the United States by her minister in Berlin, George Bancroft. (See Wharton, ii. §§ 149 and 179; Moore, iii. §§ 391-400, and Borchard, §§ 239-240.) In the same and the following years treaties of

the same kind were concluded with many other States, the last (as far as European States are concerned) with Portugal in 1908. A treaty of another kind, but with the same object, was concluded between the United States and Great Britain on May 13, 1870. (See Martens, *N.R.G.*, xx. p. 524, and Moore, iii. § 397.) All these treaties stipulate that naturalisation in one of the contracting States shall be recognised by the other, whether the naturalised individual has, or has not, previously been released from his original citizenship, provided he has resided for five years in such country. And they further stipulate that such naturalised individuals, in case they return after naturalisation into their former home State and take their residence there for some years, either *ipso facto* become again subjects of their former home State and cease to be naturalised abroad (as the Bancroft Treaties), or can be reinstated in their former citizenship, and cease thereby to be naturalised abroad (as the treaty with Great Britain).

² The Institute of International Law formulated at its meeting in Venice in 1896 six rules, which, if adopted on the part of the different States, would do away with many of the difficulties. See *Annuaire*, xv. p. 270.

VI

RECEPTION OF ALIENS AND RIGHT OF ASYLUM

Vattel, ii. § 100—Hall, §§ 63-64—Westlake, i. pp. 215-217—Lawrence, §§ 97-98—Phillimore, i. §§ 365-370—Twiss, i. § 238—Halleck, i. pp. 493-495—Taylor, § 186—Walker, § 19—Wharton, ii. § 206—Wheaton, § 115, and Dana's Note—Moore, iv. §§ 560-566—Hershey, Nos. 237-249—Bluntschli, §§ 381-398—Hartmann, §§ 84-85, 89—Heffter, §§ 61-63—Stoerk in *Holtzendorff*, ii. pp. 637-650—Gareis, § 57—Liszt, § 25—Ullmann, §§ 113-115—Bonfils, Nos. 441-446—Despagnet, Nos. 338-343—Rivier, i. pp. 307-309—Nys, ii. pp. 275-283—Calvo, ii. §§ 701-706, vi. 119—Martens, ii. § 46—Overbeck, *Niederlassungsfreiheit und Ausweisungsgerecht* (1906)—Henriques, *The Law of Aliens*, etc. (1906)—Sibley and Elias, *The Aliens Act*, etc. (1906)—*Proceedings of the American Society of International Law*, v. (1911), pp. 65-116—Borchard, § 26.

No Obligation to admit Aliens.

§ 314. Many writers¹ maintain that every member of the Family of Nations is bound by International Law to admit all aliens into its territory for all lawful purposes, although they agree that every State could exclude certain classes of aliens. This opinion is generally held by those who assert that there is a fundamental right of intercourse between States. It will be remembered² that no such fundamental right exists, but that intercourse is a characteristic of the position of the States within the Family of Nations, and, therefore, a presupposition of the international personality of every State. A State, therefore, cannot exclude aliens altogether from its territory without violating the spirit of the Law of Nations, and endangering its very membership of the Family of Nations. But no State actually does exclude aliens altogether. The question is only whether an international legal duty can be said to exist for every State to admit all unobjectionable aliens to all parts of its territory. And it is this duty which must be denied as far as the customary Law of Nations is concerned. It must be emphasised that, apart from

¹ See, for instance, Bluntschli, § 381, and Liszt, § 25.

² See above, § 141.

general conventional arrangements, as, for instance, those concerning navigation on international rivers, and apart from special treaties of commerce, friendship, and the like, no State can claim the right for its subjects to enter into, and reside on, the territory of a foreign State. The reception of aliens is a matter of discretion, and every State is by reason of its territorial supremacy competent to exclude aliens from the whole, or any part, of its territory. And it is only by an inference from this competence that Great Britain,¹ the United States of America,² and other States have made special laws according to which paupers and criminals, as well as diseased and other objectionable aliens, are prevented from entering their territory. Every State is, and must remain, master in its own house, and this is of special importance with regard to the admittance of aliens. Of course, if a State excluded all subjects of one State only, this would constitute an unfriendly act, against which retorsion would be admissible; but it cannot be denied that a State is competent to do this, although in practice such wholesale exclusion is improbable in normal times. Hundreds of treaties of commerce and friendship exist between the members of the Family of Nations according to which they are obliged to receive each other's unobjectionable subjects, and thus in practice the matter is settled, although in strict law every State is competent to exclude foreigners from its territory.³

§ 315. It is obvious that, if a State need not receive

¹ See the Aliens Act, 1905 (5 Edw. VII. c. 13), the Aliens Restriction Act, 1914 (4 & 5 Geo. v. c. 12), and the Aliens Restriction (Amendment) Act, 1919 (9 & 10 Geo. v. c. 92), especially § 16 of the latter, which relates to the repeal of the Aliens Act, 1905. See also Henriques, *The Law of Aliens*, etc. (1906), and Sibley and Elias, *The Aliens Act*, etc. (1906), with regard to the position of aliens under British

law prior to the World War.

² See Bouvé, *A Treatise on the Laws governing the Exclusion and Expulsion of Aliens in the United States* (1912).

³ The Institute of International Law adopted at its meeting at Geneva in 1892 (see *Annuaire*, xii. p. 219) forty-one articles concerning the admission and expulsion of aliens; Articles 6-13 deal with the admittance of aliens.

Reception
of Aliens
under
Condi-
tions.

aliens at all, it can receive them only under certain conditions. Thus, for example, Russia, before the World War, did not admit aliens without passports, and if the alien adhered to the Jewish faith he had to submit to a number of special restrictions.¹ Thus, further, during the time Napoleon III. ruled in France, every alien entering French territory from the sea, or from neighbouring land, was admitted only after having stated his name, nationality, and the place to which he intended to go. Some States, as Switzerland, make a distinction between such aliens as intend to settle down in the country, and such as intend only to travel in the country; no alien is allowed to settle in the country without having asked for and received a special authorisation, whereas the country is open unconditionally to all aliens who are merely travelling.

So-called
Right of
Asylum.

§ 316. The fact that every State exercises territorial supremacy over all persons on its territory, whether they are its subjects or aliens, excludes the prosecution of aliens thereon by foreign States. Thus, a foreign State is, provisionally at least, an asylum for every individual who, being prosecuted at home, crosses its frontier. In the absence of extradition treaties stipulating the contrary, no State is by International Law obliged to refuse admittance into its territory to such a fugitive or, in case he has been admitted, to expel him or deliver him up to the prosecuting State. On the contrary, States have always upheld their competence to grant asylum, if they choose to do so. Now the so-called right of asylum is certainly not a right possessed by the alien to demand that the State into whose

¹ Many special restrictions have been imposed upon the admission of aliens, especially former enemy aliens, in Great Britain and in other States for the period of reconstruction following the World War, and the requirement of passports and

other formalities is at present general; but it is not possible to discuss these in a general treatise. See the Aliens Restriction (Amendment) Act, 1919 (9 & 10 Geo. V. c. 92), and the Aliens Order, 1920, made thereunder.

territory he has entered with the intention of escaping prosecution in some other State should grant protection and asylum. For such State need not grant these things. The so-called right of asylum is nothing but the competence of every State mentioned above, and inferred from its territorial supremacy, to allow a prosecuted alien to enter, and to remain on, its territory under its protection, and thereby to grant an asylum to him. Such fugitive alien enjoys the hospitality of the State which grants him asylum; but it might be necessary to place him under surveillance, or even to intern him at some place, in the interest of the State which is prosecuting him. For it is the duty of every State to prevent individuals living on its territory from endangering the safety of another State. And if a State grants asylum to a prosecuted alien, this duty becomes of special importance.

VII

POSITION OF ALIENS AFTER RECEPTION¹

Vattel, i. § 213, ii. §§ 101-115—Hall, §§ 63 and 87—Westlake, i. pp. 218-219, 327-330—Lawrence, §§ 97-98—Phillimore, i. §§ 332-339—Twiss, i. § 163—Taylor, §§ 173, 187, 201-203—Walker, § 19—Wharton, ii. §§ 201-205—Wheaton, § 77-82—Moore, iv. §§ 534-549—Hershey, Nos. 237-249—Bluntschli, §§ 385-393—Hartmann, §§ 84-85—Heffter, § 62—Stoerk in *Holtzendorff*, ii. pp. 637-650—Gareis, § 57—Liszt, § 25—Ullmann, §§ 113-115—Bonfils, Nos. 447-454—Despagnet, Nos. 339-343—Rivier, i. pp. 309-311—Calvo, ii. §§ 701-706—Martens, ii. § 46—Gaston de Leval, *De la Protection des Nationaux à l'Étranger* (1907)—Wheeler in *A.J.*, iii. (1909), pp. 869-884—*Proceedings of the American Society of International Law*, v. (1911), pp. 32-66, 150-225—Borchard, §§ 6-8, 14-25, 34-46, 133-136, and in *A.J.*, vii. (1913), pp. 497-520.

§ 317. With his entrance into a State, an alien, unless

¹ Every student desiring information on a special point arising out of the position of aliens after reception or concerning citizens and their

property abroad must study the excellent and standard work of Borchard, *The Diplomatic Protection of Citizens Abroad* (1919).

Aliens
subjected
to Terri-
torial Su-
premacy.

he belongs to the class of those who enjoy so-called extraterritoriality, falls at once under the territorial supremacy of that State, although he remains at the same time under the personal supremacy of his home State. He is therefore under the jurisdiction of the State in which he stays, and is responsible to it for all acts he commits on its territory. He is further subjected to all administrative arrangements made by it which concern the very locality where the alien is. If in consequence of a public calamity, such as the outbreak of a fire or an infectious disease, certain administrative restrictions are enforced, they can be enforced against all aliens, as well as against citizens. But apart from jurisdiction, and mere local administrative arrangements, which concern all aliens alike, a distinction must be made between such aliens as are merely travelling, and stay, therefore, only temporarily on the territory, and such as take up their residence there either permanently or for some length of time. A State has wider power over aliens of the latter kind; it can make them pay rates and taxes, and can even compel them in case of need, and under the same conditions as citizens, to serve in the local police and the local fire brigade for the purpose of maintaining public order and safety. On the other hand, an alien does not fall under the personal supremacy of the local State; therefore he cannot be made to serve¹ in its army or navy, and cannot, like a citizen, be treated according to discretion.²

It must be emphasised that an alien is responsible to the local State for all illegal acts which he commits while the territory concerned is during war temporarily occupied by the enemy. An illustrative case is that of

¹ See, however, above, § 127, concerning the attitude of Great Britain with regard to aliens in British colonies.

² As regards religious disabilities of foreigners, see Henriques in the *Law Magazine and Review*, xxxix. (1914), pp. 320-326.

De Jager v. The Attorney-General for Natal.¹ De Jager was a burgher of the South African Republic, but a settled resident in Natal when the South African War broke out. In October 1899 the British forces evacuated that part of Natal in which Waschbank, where he lived, is situated, and it was occupied by the Boer forces for some six months. He joined them, and served in different capacities until March 1900, when he went to the Transvaal, and took no further part in the war. He was tried in March 1901, and convicted of high treason, and sentenced to five years' imprisonment and a fine of £5000, or, failing payment thereof, to a further three years.

§ 318. The rule that aliens fall under the territorial supremacy of the State they are in finds an exception in Turkey, and, further, in such other Eastern States, like China, as are, in consequence of their deficient civilisation, only for some parts members of the Family of Nations. Aliens who are subjects of Christian States and enter into the territory of such Eastern States, remain wholly under the jurisdiction² of their home State. This exceptional condition of things was based, as regards Turkey, on custom and treaties which are called Capitulations,³ but as regards other Eastern States rests almost entirely on treaties only.⁴ Jurisdiction over aliens in these countries is exercised by the consuls of

Aliens in
Eastern
Coun-
tries.

¹ [1907] A.C. 326. See Baty in the *Law Magazine and Review*, xxxiii. (1908), pp. 214-218, who disapproves of the conviction of De Jager.

² See below, § 440.

³ During the World War Turkey denounced the Capitulations; protests were at once made against this denunciation, and by the Treaty of Peace Turkey will be called upon to accept a scheme of judicial reform designed to replace the Capitulations. (See above, § 102.)

⁴ See Twiss, i. § 163, who enumerates many of these treaties. See also Phillimore, i. §§ 336-339; Liszt, § 15, iv.; Hall, *Foreign Powers and Jurisdiction*, §§ 59-91; Scott, *The Law affecting Foreigners in Egypt as the Result of the Capitulations* (1907); Pélissié du Rausas, *Le Régime des Capitulations dans l'Empire Ottoman* (2nd ed. 1910); Tchou, *Le Régime des Capitulations en Chine* (1915); Borchard, § 201-205; Overboek, *Die Kapitulationen des Osmanischen Reiches* (1917).

their home States, which have enacted special Municipal Laws for that purpose. Thus, Great Britain has enacted so-called Foreign Jurisdiction Acts at several times, which are now all consolidated in the Foreign Jurisdiction Act of 1890.¹ It must be specially mentioned that Japan has since 1899 ceased to belong to the Eastern States in which aliens are exempt from local jurisdiction.

Aliens
under the
Protection
of their
Home
State.

§ 319. Although aliens fall at once under the territorial supremacy of the State they enter, they remain, nevertheless, under the protection of their home State. By a universally recognised customary rule of the Law of Nations every State holds a right of protection² over its citizens abroad, to which corresponds the duty of every State to treat foreigners on its territory with a certain consideration which will be discussed below, §§ 320-322. The question here is only when and how this right of protection can be exercised.³ Now there is certainly, as far as the Law of Nations is concerned, no duty incumbent upon a State to exercise its protection over its citizens abroad. The matter is absolutely in the discretion of every State, and no citizen abroad has by International Law a right to demand protection from his home State, although he may have such a right by Municipal Law. Often for political reasons States have in certain cases refused to exercise their right of protection over citizens abroad. Be that as it may, every State *can* exercise this right when one of its subjects is wronged abroad in his person or property, either by the State itself on whose territory such person or property is for the time being, or by the officials or the citizens of such State,

¹ 53 & 54 Vict. c. 37. See Piggott, *Exterritoriality. The Law relating to Consular Jurisdiction*, etc. (1907); see also the Foreign Jurisdiction Act, 1913 (3 & 4 Geo. v. c. 16).

² This right has, I believe, grown up in furtherance of intercourse between the members of the Family of Nations (see above, § 142); Hall

(§ 87) and others deduce this indubitable right from the 'fundamental' right of self-preservation. Borchard, § 135, accepts my view as correct.

³ See Moore, vi. §§ 979-997, and Wheeler in *A.J.*, iii. (1909), pp. 869-884.

if it does not interfere for the purpose of making good the wrong done.¹ And this right can be exercised in several ways. Thus, a State whose subjects are wronged abroad can diplomatically insist upon the wrongdoers being punished according to the law of the land and upon damages, if necessary, being paid to its injured subjects. It can, secondly, exercise retorsion and reprisals for the purpose of making the other State comply with its demands. It can, further, exercise intervention, and it can even go to war when necessary. And there are other means besides those mentioned. It is, however, quite impossible to lay down hard and fast rules as regards the question in which way, and how far in each case, the right of protection ought to be exercised. Everything depends upon the merits of the individual case, and must be left to the discretion of the State concerned. The latter will have to take into consideration whether the wronged alien was only travelling through or had settled down in the country, whether his behaviour had been provocative or not, how far the foreign Government identified itself with the acts of its officials or subjects, and the like.

§ 320. In consequence of the right of protection over its subjects abroad which every State enjoys, and the corresponding duty of every State to treat aliens on its territory with a certain consideration, an alien, provided he owns some nationality, cannot be outlawed in foreign countries, but must be afforded protection for his person and property. The home State of the alien has, by its right of protection, a claim upon such State as allows him to enter its territory that such

Protection to be afforded to the Persons and Property of Aliens.

¹ Concerning the responsibility of a State for its own internationally injurious acts and those of its organs and other officials and its subjects, see above, §§ 151-167, and Anzilotti in *R.G.*, xiii. (1906), pp. 5 and 285. The right of protection over citizens

abroad is discussed in detail by Hall, § 87, Westlake, i. pp. 327-337, and Gaston de Leval, *op. cit.* Concerning the right of protection of a State over its citizens with regard to public debts of foreign States, see above, §§ 135 (6) and 155.

protection shall be afforded, and it is no excuse that such State does not provide any protection whatever for its own subjects. In consequence thereof, every State is by the Law of Nations compelled to grant to aliens at least equality before the law with its citizens, as far as safety of person and property is concerned. An alien must in particular not be wronged in person or property by the officials and courts of a State. Thus, the police must not arrest him without just cause, custom-house officials must treat him civilly, courts of justice must treat him justly, and in accordance with the law. Corrupt administration of the law against natives is no excuse for the same against aliens, and no Government can cloak itself with the judgment of corrupt judges.

How far
Aliens
can be
treated
according
to Dis-
cretion.

§ 321. Apart from protection of person and property, every State can treat aliens according to discretion, except in so far as its discretion is restricted through international treaties. Thus, a State can exclude aliens from certain professions and trades; it can exclude them from holding real property; it can, as Great Britain did in former times¹ and again during the World War and since, compel them to have their names registered for the purpose of keeping them under control,² and the like. Before the World War there was a tendency within all the States which are members of the Family of Nations to treat admitted aliens more and more on the same footing as citizens, political rights and duties, of course, excepted. Thus, for instance, with the exception that an alien could not be sole or part owner of a

¹ See an Act for the Registration of Aliens, 1836 (6 & 7 William IV. c. 11).

² The Aliens Restriction Act, 1914 (4 & 5 Geo. V. c. 12) provides (§ 1 (1)) that His Majesty may, at any time when a state of war exists between His Majesty and any foreign Power, or when it appears that an occasion of imminent national danger

or great emergency has arisen, make an Order in Council (f) requiring aliens to comply with such provisions as to registration, change of abode, travelling or otherwise, as may be made by the Order. See also the Aliens Restriction (Amendment) Act, 1919 (9 & 10 Geo. V. c. 92), § 1, and the Aliens Order, 1920.

British ship, aliens who had taken up their domicile in this country were for all practical purposes treated by the law of the land on the same footing as British subjects. But this is no longer the case. For example, the Aliens Restriction (Amendment) Act, 1919,¹ provides, among other disabilities, that no alien is to hold a pilotage certificate for any pilotage district in the United Kingdom,² or act as master, chief officer, or chief engineer of a British merchant ship registered in the United Kingdom, or as skipper or second hand of a British fishing boat,² or receive an appointment to the Civil Service. Further restrictions are imposed by this Act on former enemy aliens.

§ 322. Since a State holds only territorial and not personal supremacy over an alien within its boundaries, it can never, under any circumstances, prevent him from leaving its territory, provided he has fulfilled his local obligations, such as payment of rates and taxes, of fines, of private debts, and the like. And an alien leaving a State can take all his property away with him, and a tax for leaving the country, or tax upon the property he takes away with him,³ cannot be levied. And it must be specially mentioned that since the beginning of the nineteenth century the so-called *droit d'aubaine* belongs to the past; this is the name of the right of a State, which was formerly frequently exercised, to confiscate the whole estate of an alien deceased on its territory.⁴ But if a State levies estate duties in the case of a citizen dying on its territory, as Great Britain does according to the Finance Act⁵ of 1894, such duties can likewise be levied in case of an alien dying on its territory.

¹ §§ 4-12.

² These general prohibitions are subject to certain exceptions.

³ So-called *gabella emigrationis*.

⁴ See details in Wheaton, § 82. The *droit d'aubaine* was likewise named *jus albinagii*. A mitigation of the *droit d'aubaine* was the *droit*

de retraite, or *droit de détraction* or *jus detractus*, according to which the estate of a deceased alien was not confiscated, but a tax was levied upon its removal by the foreign heir.

⁵ 57 & 58 Vict. c. 30. Estate duty is levied in Great Britain in the

Departure
from the
Foreign
Country.

VIII

EXPULSION OF ALIENS

Hall, § 63—Westlake, i. p. 217—Phillimore, i. § 364—Halleck, i. pp. 493-494—Taylor, § 186—Walker, § 19—Wharton, ii. § 206—Moore, iv. §§ 550-559—Hershey, No. 247—Bluntschli, §§ 383-384—Stoerk in *Holtzendorff*, ii. pp. 644-650—Ullmann, § 115—Bonfils, No. 442—Despagnet, Nos. 336-337—Pradier-Fodéré, iii. Nos. 1857-1859—Rivier, i. pp. 311-314—Nys, ii. pp. 284-289—Calvo, vi. §§ 119-125—Fiore, *Code*, Nos. 257-264—Martens, i. § 79—Bleteau, *De l'Asile et de l'Expulsion* (1886)—Berc, *De l'Expulsion des Étrangers* (1888)—Féraud-Giraud, *Droit d'Expulsion des Étrangers* (1889)—Langhard, *Das Recht der politischen Fremdenausweisung* (1891)—Overbeck, *Niederlassungsfreiheit und Ausweisungsrecht* (1906)—Martini, *L'Expulsion des Étrangers* (1909)—Borchard, §§ 27-32—Rolin-Jaequemyns in *R.I.*, xx. (1888), pp. 499 and 615—*Proceedings of the American Society of International Law* (1911), pp. 119-150.

Com-
petence
to expel
Aliens.

§ 323. Just as a State is competent to refuse admittance to an alien, so, in conformity with its territorial supremacy, it is competent to expel at any moment an alien who has been admitted into its territory. And it matters not whether that individual is only on a temporary visit, or has settled down for professional or business purposes on its territory, having taken his domicile thereon. Such States, of course, as have a high appreciation of individual liberty and abhor arbitrary powers of Government will not readily expel aliens. Thus, the British Government had, until December 1919, no power to expel even the most dangerous alien without the recommendation of a court, or without an Act of Parliament making provision for such expulsion, except during war or on an occasion of imminent national danger or great emergency.¹ And in Switzerland, Article

case also of such aliens dying abroad as leave movable property in the United Kingdom without having ever been resident there. As far as the Law of Nations is concerned, it is doubtful whether Great Britain is competent to claim estate duties in such cases. On the question of estate duties in general, see Meynen, *Die Erbschaftssteuer im internationalen*

Rechte (1912).

¹ Aliens Restriction Act, 1914. But the Aliens Restriction (Amendment) Act, 1919, authorises the making of an Order in Council for the deportation of any aliens during the ensuing year and contains special provisions regarding the deportation of former enemy aliens.

70 of the Constitution empowers the Government to expel such aliens only as endanger the internal and external safety of the land. But many States are in no way prevented by their Municipal Law from expelling aliens according to discretion, and examples of arbitrary expulsion of aliens, who had made themselves objectionable to the respective Governments, are numerous.

On the other hand, it cannot be denied that, especially in the case of expulsion of an alien who has been residing within the expelling State for some length of time, and has established a business there, the home State of the expelled individual is, by its right of protection over citizens abroad, justified in making diplomatic representations¹ to the expelling State, and asking for the reasons for the expulsion. But as, in strict law, a State can expel even domiciled aliens without so much as giving the reasons, the refusal of the expelling State to supply the reasons for expulsion to the home State of the expelled alien does not constitute an illegal, but only a very unfriendly act. And there is no doubt that every expulsion of an alien without just cause is, in spite of its international legality, an unfriendly act, which can rightly be met with retorsion.

§ 324. On account of the fact that retorsion might be justified, the question is of importance what just causes of expulsion of aliens there are. As International Law gives no detailed rules regarding expulsion, everything is left to the discretion of the single States, and depends upon the merits of the individual case. Theory and practice correctly make a distinction between expulsion in time of war and in time of peace. A belligerent may consider it convenient to expel all enemy subjects residing, or temporarily staying, within his territory. And, although such a measure may be very

Just
Causes of
Expulsion
of Aliens.

¹ Concerning diplomatic claims for damages and arbitral awards on account of unjustified expulsions, see Borchard, § 31.

hard and cruel, the opinion is general that such expulsion is justifiable.¹ As regards expulsion in time of peace, on the other hand, the opinions of writers, as well as of States, naturally differ much. A State which expels an alien will hardly admit not having had a just cause. Some States, as Belgium² since 1885, possess Municipal Laws determining just causes for the expulsion of aliens, and their discretion concerning expulsion is, of course, more or less restricted thereby. But many States do not possess such laws, so that their discretion as to what is a just cause of expulsion is unfettered. The Institute of International Law at its meeting at Geneva in 1892 adopted a body of forty-one articles concerning the admittance and expulsion of aliens, and in Article 28 thereof enumerated nine just causes for expulsion in time of peace.³ I doubt whether the States will ever come to an agreement about just causes of expulsion. The fact cannot be denied that an alien is more or less a guest in the foreign land, and the question under what conditions a guest makes himself objectionable to his host cannot be answered once for all by the establishment of a body of rules. So much is certain, that with the gradual disappearance of despotic views in the different States, and with the advance of true constitutionalism, guaranteeing individual liberty and freedom of opinion and speech, expulsion of aliens, especially for political reasons, will become less frequent. Expulsion will, however, never totally disappear, because it may well be justified. Thus, for example, Prussia, after the annexation of the formerly Free Town of Frankfort-on-the-Main, was certainly justified in expell-

¹ Thus, in 1870, during the Franco-German War, the French expelled all Germans from France, and the former South African Republic expelled in 1899, during the Boer War, almost all British subjects. See below, vol. ii. § 100.

² See details in Rivier, i. p. 312.

³ See *Annuaire*, xii. p. 223. Many of these causes, as conviction for crimes, for instance, are certainly just causes, but others are doubtful.

ing those individuals who, for the purpose of avoiding military service in the Prussian Army, had by naturalisation become Swiss citizens without giving up their residence at Frankfort.

§ 325. Expulsion is, in theory at least, not a punishment, but an administrative measure consisting in an order of the Government directing a foreigner to leave the country. Expulsion must therefore be effected with as much forbearance and indulgence as the circumstances and conditions of the case allow and demand, especially when compulsion is meted out to a domiciled alien. And the home State of the expelled alien, by its right of protection over its citizens abroad, may well insist upon such forbearance and indulgence. But this is valid as regards the first expulsion only. Should the expelled alien refuse to leave the territory voluntarily or, after having left, return without authorisation, he may be arrested, punished, and forcibly brought to the frontier.

§ 326. In many Continental States destitute aliens, foreign vagabonds, suspicious aliens without papers of legitimation, alien criminals who have served their punishment, and the like, are, without any formalities, arrested by the police and reconducted to the frontier. There is no doubt that the competence to carry out such reconduction, which is often called *droit de renvoi*, is an inference from the territorial supremacy of every State, for there is no reason whatever why a State should not get rid of such undesirable aliens as speedily as possible. But although such reconduction is materially not much different from expulsion, it nevertheless differs much from this in form, since expulsion is an order to leave the country, whereas reconduction is forcible conveying away of foreigners.¹ The home State of such recon-

Expulsion, how effected.

Reconduction in contradistinction to Expulsion.

¹ Rivier, i. p. 308, correctly distinguishes between reconduction and

expulsion, but Phillimore, i. § 364, seems to confound them.

ducted aliens has the duty to receive them, since, as will be remembered,¹ a State cannot refuse to receive such of its subjects as are expelled from abroad. Difficulties arise, however, sometimes concerning the reconduction of such alien individuals as have lost their nationality through long-continued absence² from home without having acquired another nationality abroad. Such cases are a further example of the fact that the very existence of Stateless individuals is a blemish in Municipal, as well as International Law.³

IX

EXTRADITION

Hall, §§ 13 and 63—Westlake, i. pp. 252-261—Lawrence, §§ 110-111—Phillimore, i. §§ 365-389d—Twiss, i. § 236—Halleck, i. pp. 250-256—Taylor, §§ 205-211—Walker, § 19—Hershey, Nos. 250-252—Wharton, ii. §§ 268-282—Wheaton, §§ 115-121—Moore, iv. §§ 579-622—Bluntschli, §§ 394-401—Hartmann, § 89—Heffter, § 63—Lammasch in *Holtzendorff*, iii. pp. 454-566—Liszt, § 33—Ullmann, §§ 127-131—Bonfils, Nos. 455-481—Despagnet, Nos. 276-303—Pradier-Fodéré, iii. Nos. 1860-1893—Mérignhac, ii. pp. 732-778—Rivier, i. pp. 348-357—Nys, ii. pp. 290-303—Calvo, ii. §§ 949-1071—Fiore, *Code*, Nos. 589-592—Martens, ii. §§ 91-98—Spear, *The Law of Extradition* (1879)—Lammasch, *Auslieferungspflicht und Asylrecht* (1887)—Martitz, *Internationale Rechtshilfe in Strafsachen*, 2 vols. (1888 and 1897)—Bernard, *Traité théorique et pratique de l'Extradition*, 2 vols. (2nd ed. 1890)—Moore, *Treatise on Extradition* (1891)—Hawley, *The Law of International Extradition* (1893)—Beauchet, *Traité de l'Extradition* (1899)—Clarke, *The Law of Extradition* (4th ed. 1903)—Biron and Chalmers, *The Law and Practice of Extradition* (1903)—Piggott, *Extradition* (1910)—Saint-Aufin, *L'Extradition*, 2 vols. (1913)—Lammasch in *R.G.*, iii. (1896), pp. 5-14—Diena in *R.G.*, xii. (1905), pp. 516-544—Devogel in *R.I.*, 2nd Ser. xiv. (1912), pp. 187-193—Struycken and others in *Reports of the International Law Association*, xxvii. (1912), pp. 139-161—Hyde in *A.J.*, viii. (1914), pp. 487-514—See the French, German, and Italian literature concerning extradition quoted by Fauchille in Bonfils, No. 455.

¹ See above, § 294.

² See above, § 302 (3).

³ It ought to be mentioned that many States have, either by special

treaties or in their treaties of commerce, friendship, and the like, stipulated proper treatment for each other's destitute subjects on each other's territory.

§ 327. Extradition is the delivery of a prosecuted individual to the State on whose territory he has committed a crime by the State on whose territory the criminal is for the time staying. Although Grotius¹ holds that every State has the duty either to punish, or to surrender to the prosecuting State, such individuals within its boundaries as have committed a crime abroad, and although there is as regards the majority of such cases an important interest of civilised mankind that this should be done, this rule of Grotius has never been adopted by the States, and has, therefore, never become a rule of the Law of Nations. On the contrary, States have always upheld their competence to grant asylum to foreign individuals as an inference from their territorial supremacy, those cases, of course, excepted which fall under stipulations of special extradition treaties, if any. There is, therefore, no universal rule of customary International Law in existence which commands² extradition.

Extradition no Legal Duty.

§ 328. Since, however, modern civilisation categorically demands extradition of criminals as a rule, numerous treaties have been concluded between the several States, stipulating the cases in which extradition shall take place. According to these treaties, individuals prosecuted for the more important crimes, political crimes excepted, are in fact always surrendered to the prosecuting State, if not punished locally. But this solution of the problem of extradition is a product of the nineteenth century only. Before the eighteenth century, extradition of ordinary criminals hardly ever

Extradition Treaties, how arisen.

¹ ii. c. 21, § 4.

² Clarke, *op. cit.*, pp. 1-15, tries to prove that a duty to extradite criminals does exist, but the result of all his labour is that he finds that the refusal of extradition is a 'serious violation of the moral obligations

which exist between civilised communities' (see p. 14). But nobody has ever denied this, as far as the ordinary criminal is concerned. The question is only whether an international *legal* duty exists to surrender a criminal. And this *legal* duty States have always denied.

occurred, although many States used then frequently to surrender to each other political fugitives, heretics, and even emigrants, either in consequence of special treaties stipulating the surrender of such individuals, or voluntarily without such treaties. Matters began to undergo a change in the eighteenth century, for then treaties between neighbouring States frequently stipulated extradition of ordinary criminals besides that of political fugitives, conspirators, military deserters, and the like. Vattel (ii. § 76) is able to assert in 1758 that murderers, incendiaries, and thieves are regularly surrendered by neighbouring States to each other. But general treaties of extradition between all the members of the Family of Nations did not exist in the eighteenth century, and there was hardly a necessity for such general treaties, since traffic was not so developed as nowadays, and fugitive criminals seldom succeeded in reaching a foreign territory beyond that of a neighbouring State. When, however, in the nineteenth century, with the appearance of railways and transatlantic steamships, transit began to develop immensely, criminals used the opportunity to flee to distant foreign countries. It was then, and in consequence of this, that the conviction was forced upon the States of civilised humanity that it was in their common interest to surrender ordinary criminals regularly to each other. General treaties of extradition became, therefore, a necessity, and the several States succeeded in concluding such treaties with each other. There is no civilised State in existence nowadays which has not concluded such treaties with the majority of the other civilised States. And the consequence is that, although no universal rule of International Law commands it, extradition of criminals between States is an established fact based on treaties. The present condition of affairs is, however, very unsatisfactory, since there are many hundreds of treaties

in existence which do not at all agree in their details. What is required nowadays, and what will certainly be realised in the near future, is a universal treaty of extradition—one single treaty to which all the civilised States become parties.¹

§ 329. Some States, however, were unwilling to depend entirely upon the discretion of their Governments as regards the conclusion of extradition treaties and the procedure in extradition cases. They have therefore enacted special Municipal Laws, which enumerate those crimes for which extradition shall be granted and asked in return, and which at the same time regulate the procedure in extradition cases. These Municipal Laws² furnish the basis for the conclusion of extradition treaties. The first in the field with such an extradition law was Belgium in 1833, which remained, however, for far more than a generation quite isolated. It was not until 1870 that England followed the example given by Belgium. English public opinion was for many years against extradition treaties at all, considering them as a great danger to individual liberty, and to the competence of every State to grant asylum to political refugees. This country possessed, therefore, before 1870 a few extradition treaties only, and they were in many points inadequate. But in 1870 the British Government succeeded in getting Parliament to pass the Extradition Act.³ This Act, which was amended in 1873,⁴ in 1895,⁵ and in 1906,⁶ has furnished the basis for extradition treaties between Great Britain and forty-

Municipal
Extradi-
tion Laws.

¹ The Second Pan-American Conference of 1902 produced a treaty of extradition which was signed by twelve States, namely, the United States of America, Colombia, Costa Rica, Chili, San Domingo, Ecuador, Salvador, Guatemala, Haiti, Honduras, Mexico, and Nicaragua, but this treaty has not been ratified; see the text in *Annuaire de la Vie internationale* (1908-1909), p. 461.

² See Martitz, *Internationale Rechtshilfe*, i. pp. 747-818, where the history of all these laws is sketched and their text is printed.

³ 33 & 34 Vict. c. 52.

⁴ 36 & 37 Vict. c. 60.

⁵ 58 & 59 Vict. c. 33. On the history of extradition in Great Britain before the Extradition Act, 1870, see Clarke, *op. cit.*, pp. 126-166.

⁶ 6 Edw. VII. c. 15.

two other States.¹ Luxemburg enacted an extradition law in 1870, and Belgium a new law in 1874. Holland enacted such a law in 1875, Argentina in 1885, the Congo Free State in 1886, Peru in 1888, Switzerland in 1892, Norway in 1908, Brazil and Russia in 1911.²

Such States as possess no extradition laws, and whose written constitution does not mention the matter, leave it to their Governments to conclude extradition treaties according to their discretion. And in these countries the Governments are competent to extradite an individual, even if no extradition treaty exists.

Object of
Extradition.

§ 330. Since extradition is the delivery of an incriminated individual to the State on whose territory he has committed a crime by the State on whose territory he is for the time staying, the object of extradition can be any individual, whether he is a subject of the prosecuting State, or of the State which is required to extradite him, or of a third³ State. Many States, however, as France and most other States of the European continent, have adopted the principle of never extraditing one of their subjects to a foreign State, but themselves punishing their own subjects for grave crimes committed abroad. Other States, as Great Britain and the United States, have not adopted this principle, and do extradite such of their subjects as have committed a grave crime abroad. Thus Great Britain surrendered in 1879 to Austria, where he was convicted and hanged,⁴ one Tourville, a British subject, who,

¹ The full text of these treaties is printed by Clarke, *op. cit.*, as well as Biron and Chalmers, *op. cit.* Not to be confounded with extradition of criminals to foreign States is extradition within the British Empire from one part of the British dominions to another. This matter is regulated by the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69).

² See Devogel in *R.I.*, 2nd Ser. xiv. (1912), pp. 187-193.

³ *Reg. v. Ganz*, (1882) 9 Q.B.D. 93.

⁴ This case is all the more remarkable, as (see 24 & 25 Vict. c. 100, § 9) the Criminal Law of England extends over murder and manslaughter committed abroad by English subjects, and as, according to Article 3 of the Extradition Treaty of 1873 between England and Austria-Hungary, the contracting parties were in no case under an

after having murdered his wife in the Tyrol, had fled home to England. And it must be emphasised that the object of extradition is an individual who has committed a crime abroad, whether or not he was during the commission of the criminal act physically present on the territory of the State where the crime was committed. Thus, in 1884, Great Britain surrendered one Nillins to Germany, who, by sending from Southampton forged bills of exchange to a merchant in Germany as payment for goods ordered, was considered to have committed forgery, and to have obtained goods by false pretences, in Germany.¹

A conflict between International and Municipal Law arises if a certain individual must be extradited according to an extradition treaty, but cannot be extradited according to the Municipal Law of the State from which extradition is demanded. Thus in the case of Salvatore Paladini,² whose extradition was demanded by the United States of America from the Italian Government in 1888 for having passed counterfeit money, Italian Municipal Law, which prohibits the extradition of an Italian citizen, came into conflict with Article 1 of the Extradition Treaty of 1868 between Italy and the United States, which stipulates extradition of criminals

obligation to extradite their own subjects. Although Great Britain is ready to extradite one of her own subjects for crimes committed abroad, she was formerly in some cases prevented from doing so because the extradition treaties concerned comprised a clause stipulating that nationals *should not* be extradited. Thus the extradition of Alfred Thomas Wilson, who had committed a theft in Zurich in 1877, and whose surrender was claimed by Switzerland, had to be refused, because the Anglo-Swiss Treaty of 1874 comprised such a clause (see *Reg. v. Wilson*, (1877) 3 Q.B.D. 42). To avoid such a deplorable result, subsequent extradition treaties between

Great Britain and foreign States comprise a clause according to which no party is *compelled* to extradite nationals. It is thus left to the discretion of the parties whether they will extradite one of their own subjects or not. As late as 1906, the extradition of a British subject had to be refused to France because Article 2 of the Anglo-French Extradition Treaty of 1876 precluded the surrender of nationals. However, by a Convention of 1908 (Treaty Ser. (1909), No. 34), Article 2 of the Treaty of 1876 has been remodelled.

¹ See Clarke, *op. cit.*, pp. 177 and 262, who, however, disapproves of this surrender.

² See Moore, *iv.* § 594, pp. 290-297.

without exempting nationals. For this reason Italy refused to extradite Paladini. It is noteworthy that the United States, although they do not any longer press for extradition of Italian subjects who, after having committed a crime in the United States, have returned to Italy, nevertheless consider themselves bound by the above-mentioned treaty of 1868 to extradite to Italy such American subjects as have committed a crime in Italy. Therefore, when in 1910 the Italian Government demanded from the United States extradition of one Porter Charlton,¹ an American citizen, for having committed a murder in Italy, extradition was granted by the United States Government, and this action was upheld by the Supreme Court of the United States to which Charlton appealed.²

Extra-
ditable
Crimes.

§ 331. Unless a State is restricted by an extradition law, it can grant extradition for any crime it thinks fit. And unless a State is bound by an extradition treaty, it can refuse extradition for any crime. Such States as possess extradition laws frame their extradition treaties conformably therewith, and specify in those treaties all those crimes for which they are willing to grant extradition. And no person is to be extradited whose deed is not a crime according to the Criminal Law of the State which is asked to extradite, as well as of the State which demands extradition. As regards Great Britain, the following are extraditable crimes according to the Extradition Act of 1870: murder and manslaughter; counterfeiting and uttering counterfeit money; forgery and uttering what is forged; embezzlement and larceny; obtaining goods or money by false pretences; crimes by bankrupts against bankruptcy laws; fraud by a bailee, banker, agent, factor, trustee, or by a director, or member, or public officer

¹ See *A. J.*, v. (1911), pp. 182-192; vii. (1913), pp. 580-582, 637-653.

² *Charlton v. Kelly*, 229 U.S. 447. See below, § 547 n.

of any company; rape; abduction; child stealing; burglary and housebreaking; arson; robbery with violence; threats with intent to extort; piracy by the Law of Nations; sinking or destroying a vessel at sea; assaults on board ship on the high seas with intent to destroy life or to do grievous bodily harm; revolt or conspiracy against the authority of the master on board a ship on the high seas. The Extradition Acts of 1873 and 1906 added the following crimes to the list: kidnapping, false imprisonment, perjury, subornation of perjury, and bribery.

Political criminals are, as a rule, not extradited,¹ and according to many extradition treaties, military deserters and persons who have committed offences against religion are likewise excluded from extradition.

§ 332. Extradition is granted only if asked for,² and after the formalities have taken place which are stipulated in the treaties of extradition and the extradition laws, if any. It is effected through the handing over of the criminal by the police of the extraditing State to the police of the prosecuting State. But it must be emphasised that, according to most extradition treaties, it is a condition that the extradited individual shall be tried and punished for those crimes exclusively for which his extradition has been asked and granted, or for those, at least, which the extradition treaty concerned enumerates.³ If, nevertheless, an extradited individual is tried and punished for another crime, the extraditing State has a right of intervention.⁴

Effectuation and Condition of Extradition.

An important question is whether, in case a criminal,

¹ See below, §§ 333-340.

² Many treaties make it a condition of extradition that *reciprocity* is granted. On the so-called reciprocity clause, see Mettgenberg in the *Archiv für öffentliches Recht*, xxv. (1910), pp. 1-148.

³ See Mettgenberg in the *Zeit-*

schrift für internationales Recht, xviii. (1908), pp. 425-430.

⁴ It ought to be mentioned that the Institute of International Law in 1880, at its meeting in Oxford (see *Annuaire*, v. p. 127), adopted a body of twenty-six rules concerning extradition.

who has succeeded in escaping into the territory of another State, is erroneously handed over, without the formalities of extradition having been complied with, by the police of the local State to the police of the prosecuting State, such local State can demand that the prosecuting State shall send the criminal back, and ask for his formal extradition. This question was decided in the negative in February 1911 by the Court of Arbitration at the Hague in the case of *France v. Great Britain*, concerning Savarkar. This British-Indian subject, who was prosecuted for high treason and abetment of murder, and was being transported in the P. and O. boat *Morea* to India for the purpose of standing his trial there, escaped to the shore on October 25, 1910, while the vessel was in the harbour of Marseilles. He was, however, seized by a French policeman, who, erroneously and without further formalities, reconducted him to the *Morea* with the assistance of individuals from the vessel who had raised a hue and cry. Since Savarkar was *prima facie* a political criminal, France demanded that England should give him up, and should request his extradition in a formal way; but England refused to comply with this demand, and the parties, therefore, agreed to have the conflict decided by the Court of Arbitration at the Hague. The award, while admitting that an irregularity had been committed by the reconduction of Savarkar to the British vessel, decided, correctly, I believe, in favour of Great Britain, asserting that there was no rule of International Law imposing, in circumstances such as those which have been set out above, any obligation on the Power which has a prisoner in its custody, to restore him on account of a mistake committed by the foreign agent who delivered him up to that Power.¹ It should be men-

¹ See Hamelin, *L'Affaire Savarkar* (Extrait du *Recueil général de Jurisprudence, de Doctrine, et de Législation coloniales*, 1911), who

tioned that the French Government had been previously informed of the fact that Savarkar would be a prisoner on board the *Morea* while she was calling at Marseilles, and had agreed to this.

Somewhat similar to the case of Savarkar is the remarkable case of Lamirande which occurred in 1866.¹ He was a French subject, and was arrested in Canada under an extradition warrant on a charge of forgery. He applied to a superior tribunal on the ground that his surrender was not justified by the Extradition Treaty with France, but was erroneously surrendered to France before his application was heard. The judge and the British law officers took the view that the surrender of Lamirande was not justified by the Extradition Treaty, and the British Government asked the French Government to remit him to Canada, not indeed on the ground of any international obligation, but as a matter of comity. However, the French Government refused to accede to this request, contending that the error through which Lamirande had been surrendered did not afford any ground for removing him from the control of the French courts.

X

PRINCIPLE OF NON-EXTRADITION OF POLITICAL CRIMINALS

Westlake, i. pp. 256-258—Lawrence, § 111—Taylor, § 212—Hershey, Nos. 253-255—Wharton, ii. § 272—Moore, iv. § 604—Bluntschli, § 396—Hartmann, § 89—Lammasch in *Holtzendorff*, iii. pp. 485-510—Liszt, § 33—Ullmann, § 129—Rivier, i. pp. 351-357—Nys, ii. pp. 300-303—Calvo, ii. §§ 1034-1036—Martens, ii. § 96—Bonfils, Nos. 466-467—

defends the French view. The award of the Court of Arbitration has been severely criticised by Baty in the *Law Magazine and Review*, xxxvi. (1911), pp. 326-330; Kohler in *Z.V.*, v. (1911), pp. 202-211; Strupp, *Zwei praktische Fälle aus dem Völkerrecht* (1911), pp. 12-26;

Robin in *R.G.*, xviii. (1911), pp. 303-352; Hamel in *R.I.*, 2nd Ser. xiii. (1911), pp. 370-403.

¹ The documents relating to this case are printed on pp. 28-29 of the British counter-case in the Savarkar Arbitration.

Pradier-Fodéré, iii. Nos. 1871-1873 — Mérignhac, ii. pp. 754-771 — Soldan, *L'Extradition des Criminels politiques* (1882) — Martitz, *Internationale Rechtshilfe in Strafsachen*, vol. ii. (1897), pp. 134-707 — Lammasch, *Auslieferungspflicht und Asylrecht* (1887), pp. 203-355 — Grivaz, *Nature et Effets du Principe de l'Asile politique* (1895) — Piggott, *Extradition* (1910), pp. 42-60 — Teichmann, Hornung, Martens, and Saripolos in *R.I.*, xi. (1879), pp. 475-526 — Scott in *A.J.*, iii. (1909), pp. 459-461 — Hyde in *A.J.*, viii. (1914), pp. 489-495.

How
non-Ex-
tradition
of Political
Criminals be-
came the
Rule.

§ 333. Before the French Revolution¹ the term 'political crime' was unknown both in the theory and practice of the Law of Nations, and the principle of non-extradition of political criminals was likewise non-existent. On the contrary, whereas extradition of ordinary criminals was, before the eighteenth century at least, hardly ever stipulated, treaties very often stipulated the extradition of individuals who had committed such deeds as are nowadays termed 'political crimes,' and such individuals were frequently extradited, even when no treaty stipulated it.² Moreover, writers in the sixteenth and seventeenth centuries did not at all object to such a practice on the part of the States; on the contrary, they frequently approved of it.³ It was indirectly due to the French Revolution that matters gradually underwent a change, since this event was the starting-point for the revolt in the nineteenth century against despotism and absolutism throughout the western part of the European continent. It was then that the term 'political crime' arose, and Article 120 of the French Constitution of 1793 granted asylum to foreigners exiled from their home country 'for the cause of liberty.' On the other hand, the French emigrants, who had fled from France to escape the Reign of Terror, found an asylum in foreign States. However, the modern principle of non-extradition of

¹ I follow in this section for the most part the summary of the facts given by Martitz, *op. cit.*, ii. pp. 134-184.

² Martitz, *op. cit.*, ii. p. 177, gives

a list of important extraditions of political criminals which took place between 1648 and 1789.

³ So Grotius, ii. c. 21, § 5, No. 5.

political criminals did not even then conquer the world. Until 1830 political criminals were frequently extradited. But public opinion in free countries began gradually to revolt against such extradition, and Great Britain was its first opponent. The fact that several political fugitives were surrendered by the Governor of Gibraltar to Spain created a storm of indignation in Parliament in 1815, where Sir James Mackintosh proclaimed the principle that no nation ought to refuse asylum to political fugitives. And in 1816 Lord Castlereagh declared that there could be no greater abuse of the law than by allowing it to be the instrument of inflicting punishment on foreigners who had committed political crimes only. The second in the field was Switzerland, the asylum for many political fugitives from neighbouring countries, when, after the final defeat of Napoleon, the reactionary Continental monarchs refused the introduction of constitutional reforms which were demanded by their peoples. And although, in 1823, Switzerland was forced by threats of the reactionary leading Powers of the Holy Alliance to restrict somewhat the asylum afforded by her to individuals who had taken part in the unsuccessful political revolts in Naples and Piedmont, the principle of non-extradition went on fighting its way. The question as to that asylum was discussed with much passion in the press of Europe ; and, although the principle of non-extradition was far from becoming universally recognised, that discussion indirectly fostered its growth. A practical proof thereof is that in 1830 even Austria and Prussia, two of the reactionary Powers of that time, refused Russia's demand for extradition of fugitives who had taken part in the Polish Revolution of that year. And another proof thereof is that at about the same time, in 1829, a celebrated dissertation ¹ by a Dutch jurist made its

¹ H. Provó Kluit, *De Deditiōne Profugorum*.

appearance, in which the principle of non-extradition of political criminals was for the first time defended with juristic arguments, and on a juristic basis.

On the other hand, a reaction set in in 1833, when Austria, Prussia, and Russia concluded treaties which remained in force for a generation, and which stipulated that thenceforth individuals who had committed crimes of high treason and *lèse-majesté*, or had conspired against the safety of the throne and the legitimate Government, or had taken part in a revolt, should be surrendered to the State concerned. The same year, however, is epoch-making in favour of the principle of non-extradition of political criminals, for in 1833 Belgium enacted her celebrated extradition law, the first of its kind, being the very first Municipal Law which expressly interdicted the extradition of foreign political criminals. As Belgium, which had seceded from the Netherlands in 1830 and became recognised and neutralised by the Powers in 1831, owed her very existence to revolt, she felt the duty of making it a principle of her Municipal Law to grant asylum to foreign political fugitives, a principle which was for the first time put into practice in the treaty of extradition concluded in 1834 between Belgium and France. The latter, which to the present day has no municipal extradition law, has nevertheless henceforth always in her extradition treaties with other Powers stipulated the principle of non-extradition of political criminals. And the other Powers followed gradually. Even Russia had to give way, and since 1867 this principle is to be found in all extradition treaties between Russia and other Powers, that with Spain of 1888 excepted. It is due to the stern attitude of Great Britain, Switzerland, Belgium, France, and the United States that the principle has conquered the world. These countries, in which individual liberty is the very basis of all political life, and constitutional

government a political dogma of the nation, watched with abhorrence the methods of government of many other States between 1815 and 1860. These Governments were more or less absolute and despotic, repressing by force every endeavour of their subjects to obtain individual liberty and a share in the government. Thousands of the most worthy citizens and truest patriots had to leave their country for fear of severe punishment for political crimes. Great Britain, and the other free countries, felt in honour bound not to surrender such exiled patriots to the persecution of their Governments, but to grant them an asylum.

§ 334. Although the principle became, and is, generally¹ recognised that political criminals should not be extradited, serious difficulties exist concerning the conception of 'political crime.' This conception is of great importance, as the extradition of a criminal may depend upon it. It is unnecessary here to discuss the numerous details of the controversy. It suffices to state that, whereas many writers call such a crime 'political' as was committed from a political motive, others call 'political' any crime committed for a political purpose; again, others recognise such a crime only as 'political' as was committed from a political motive, and at the same time for a political purpose; and, thirdly, some writers confine the term 'political crime' to certain offences against the State only, such as high treason, *lèse-majesté*, and the like.² To the present day all attempts to formulate a satisfactory conception of the term have failed, and the reason of the thing will, I believe, for ever exclude the possibility of finding a satisfactory conception and definition.³ The difficulty

Difficulty concerning the Conception of Political Crime.

¹ See, however, below, § 340, concerning the reactionary movement in the matter.

² See Mettgenberg, *Die Attentatsklausel im deutschen Auslieferungsrecht* (1906), pp. 61-76, where a survey

of the different opinions is given.

³ According to Stephen, *History of the Criminal Law in England*, ii. p. 71, political crimes are such as are incidental to, and form a part of, political disturbances.

is caused through the so-called 'relative political crimes' or *délits complexes*—namely, those complex cases in which the political offence comprises at the same time¹ an ordinary crime, such as murder, arson, theft, and the like. Some writers deny categorically that such complex crimes are political; but this opinion is wrong and dangerous, since indeed many honourable political criminals would have to be extradited in consequence thereof. On the other hand, it cannot be denied that many cases of complex crimes, although the deed may have been committed from a political motive or for a political purpose, are such as ought not to be considered political. Such cases have aroused the indignation of the whole civilised world, and have indeed endangered the very value of the principle of non-extradition of political criminals. Three practical attempts have therefore been made to deal with such complex crimes without violating this principle.

The so-called Belgian *Attentat* Clause.

§ 335. The first attempt was the enactment of the so-called *attentat* clause by Belgium in 1856, following the case of Jacquin² in 1854. A French manufacturer named Jules Jacquin, domiciled in Belgium, and a foreman of his factory named Célestin Jacquin, who was also a Frenchman, tried to cause an explosion on the railway line between Lille and Calais with the intention of murdering the Emperor Napoleon III. France requested the extradition of the two criminals, but the Belgian Court of Appeal had to refuse the surrender on

¹ The problem came twice before the English courts; see *Ex parte Castioni*, [1891] 1 Q.B. 149, and *In re Meunier*, [1894] 2 Q.B. 415. In the case of Castioni, a Swiss who had taken part in a revolutionary movement in the canton of Ticino and had incidentally shot a member of the Government, the court refused extradition because the crime was considered to be political. On the other hand, in the case of Meunier, a

French anarchist who was prosecuted for having caused two explosions in France, one of which resulted in the death of two individuals, the extradition was granted because the crime was not considered to be political. On the American practice, see Hyde in *A.J.*, viii. (1914), pp. 491-495.

² See details in Martitz, *op. cit.*, ii. p. 372.

account of the Belgian extradition law interdicting the surrender of political criminals. To provide for such cases in the future, Belgium enacted in 1856 a law amending her extradition law, and stipulating that murder of the head of a foreign Government, or of a member of his family, should not be considered a political crime. Gradually all European States, with the exception of England and Switzerland, have adopted that *attentat* clause, and a great many Continental writers urge its adoption by the whole of the civilised world.¹

§ 336. Another attempt to deal with complex crimes, without detriment to the principle of non-extradition of political criminals, was made by Russia in 1881. Influenced by the murder of the Emperor Alexander II. in that year, Russia invited the Powers to hold an international conference at Brussels to consider the proposal that henceforth no murder, or attempt to murder, ought to be considered as a political crime. But the conference did not take place, since Great Britain, as well as France, declined to take part in it.² Thus the development of things had come to a standstill, many States having adopted, others declining to adopt, the Belgian clause, and the Russian proposal having fallen through.

§ 337. Eleven years later, in 1892, Switzerland attempted a solution of the problem on a new basis. In that year Switzerland enacted an extradition law whose Article 10 recognises the non-extradition of political criminals, but, at the same time, lays down the rule that political criminals shall nevertheless be surrendered, in case the chief feature of the offence wears more the aspect of an ordinary than of a political crime, and that the decision concerning the extraditability of such criminals rests with the Bundesgericht, the highest

The
Russian
Project of
1881.

The Swiss
Solution
of the
Problem
in 1892.

¹ See Mettgenberg, *op. cit.*, pp. 109-114.

² See details in Martitz, *op. cit.*, ii. p. 479.

Swiss court of justice. This Swiss rule contains a better solution of the problem than the Belgian *attentat* clause, in so far as it allows the circumstances of the special case to be taken into consideration. And the fact that the decision is taken out of the hands of the Government and transferred to the highest court of the country, denotes likewise a remarkable progress.¹ For the Government cannot now be blamed whether extradition is granted or refused, the decision of an independent court of justice being a certain guarantee that an impartial view of the circumstances of the case has been taken.²

§ 338. The numerous attempts³ against the lives of heads of States, and the frequency of anarchistic crimes, have shaken the value of the principle of non-extradition of political criminals in the opinion of the civilised world,

¹ See Langhard, *Das schweizerische Auslieferungsgesetz* (1910), where all the cases are discussed which have come before the court since 1892.

² It ought to be mentioned that the Institute of International Law at

its meeting at Geneva in 1892 (see *Annuaire*, xii. p. 182) adopted four rules concerning extradition of political criminals, but I do not think that on the whole these rules give much satisfaction.

³ Not less than twenty-four of these attempts have been successful since 1850, as the following formidable list shows:—

Charles III., Duke of Parma,	murdered on March 26, 1854.
Prince Danilo of Montenegro,	„ August 14, 1860.
President Abraham Lincoln, U.S.A.,	„ April 14, 1865.
Prince Michael of Serbia,	„ June 10, 1868.
President Balta of Peru,	„ July 26, 1872.
President Moreno of Ecuador,	„ August 14, 1872.
Sultan Abdul Assis of Turkey,	„ June 4, 1876.
Emperor Alexander II. of Russia,	„ March 13, 1881.
President Garfield, U.S.A.,	„ July 2, 1881.
President Carnot of France,	„ June 24, 1894.
Shah Nazr-e-Din of Persia,	„ May 1, 1896.
Empress Elizabeth of Austria,	„ September 10, 1898.
King Humbert I. of Italy,	„ July 29, 1900.
President McKinley, U.S.A.,	„ September 6, 1901.
King Alexander I. of Serbia and Queen Draga,	„ June 11, 1903.
King Carlos I. of Portugal and the Crown Prince,	„ February 15, 1908.
President Caceres of San Domingo,	„ November 19, 1911.
King George of Greece,	„ March 18, 1913.
Archduke Francis Ferdinand, the heir-presumptive to the Austrian throne, and his Consort,	„ June 28, 1914.
President Paes of Portugal,	„ December 15, 1918.
President Carranza of Mexico,	„ May 1920.

as illustrated by the three practical attempts described above to meet certain difficulties. It is, consequently, no wonder that some writers ¹ plead openly and directly for the abolition of this principle, maintaining that it was only the product of abnormal times and circumstances, such as were in existence during the first half of the nineteenth century, and that with their disappearance the principle is likely to do more harm than good. And indeed it cannot be denied that the application of the principle in favour of some criminals, such as anarchistic ² murderers and bomb-throwers, could only be called an abuse. But the question is whether, apart from such exceptional cases, the principle itself is still to be considered as justified or not.

Rationale
for the
Principle
of non-
Extradi-
tion of
Political
Criminals.

Without doubt the answer must be in the affirmative. I readily admit that every political crime is by no means an honourable deed, which as such deserves protection. Still, political crimes are committed by the best of patriots, and, what is of more weight, they are in many cases a consequence of oppression on the part of the Government concerned. They are comparatively infrequent in free countries, where there is individual liberty, where the nation governs itself, and where, therefore, there are plenty of legal ways of bringing grievances before the authorities. A free country can never agree to surrender foreigners to their prosecuting home State for deeds done in the interest of the same freedom and liberty which the subjects of such free country enjoy. For individual liberty and self-government of nations are demanded by modern civilisation,

¹ See, for instance, Rivier, i. p. 354, and Scott in *A.J.*, iii. (1909), p. 459.

² '... the party with whom the accused is identified... namely the party of anarchy, is the enemy of all Governments. Their efforts are directed primarily against the

general body of citizens. They may, secondarily and incidentally, commit offences against some particular Government; but anarchist offences are mainly directed against private citizens.' (From the judgment of Cave, J. *In re Meunier*, [1894] 2 Q.B. 419.) See also Diena in *R.G.*, ii. (1895), pp. 306-336.

and their gradual realisation over the whole globe is conducive to the welfare of the human race.

Political crimes may certainly be committed in the interest of reaction, as well as in the interest of progress, and reactionary political criminals may have occasion to ask for asylum, as well as progressive political criminals. The principle of non-extradition of political criminals indeed extends its protection over the former too, and this is the very point where the value of the principle reveals itself. For no State has a right to interfere with the internal affairs of another State, and if a State were to surrender reactionary political criminals but not progressive ones, the prosecuting State of the latter could indeed complain, and consider the refusal of extradition an unfriendly act. If, however, non-extradition is made a general principle, which finds its application in favour of political criminals of every kind, no State can complain if extradition is refused. Have not reactionary States the same faculty of refusing the extradition of reactionary political criminals as free States have of refusing the extradition of progressive political criminals ?

Now, many writers agree upon this point, but maintain that such arguments meet the so-called purely political crimes only, and not the relative or complex political crimes, and they contend, therefore, that the principle of non-extradition ought to be restricted to the former crimes alone. But to this I cannot assent. No revolt happens without such complex crimes taking place, and the individuals who commit them may indeed deserve the same protection as other political criminals. And, further, although I can under no circumstances approve of murder, can never sympathise with a murderer, and can never pardon his crime, it may well be the case that the murdered official or head of a State has by inhuman cruelty and oppression himself whetted

the knife which cut short his span of life. On the other hand, the mere fact that a crime was committed for a political purpose may well be without any importance in comparison with its detestability and heinousness. Attempts on heads of States, such, for example, as the murders of Presidents Lincoln and Carnot, or of Alexander II. of Russia and Humbert of Italy, are as a rule, and all anarchistic crimes are, without any exception, crimes of that kind. Criminals who commit such crimes ought, under no circumstances, to find protection and asylum, but ought to be surrendered for the purpose of receiving their just and appropriate punishment.

§ 339. The question, however, is how to sift the chaff from the wheat, how to distinguish between such political criminals as deserve an asylum, and such as do not. The difficulties are great, and partly insuperable, as long as we do not succeed in finding a satisfactory conception of the term 'political crime.' But such difficulties are only partly, and not wholly insuperable. The step taken by the Swiss extradition law of 1892 is so far a step in advance as to meet a great many of the difficulties.¹ There is no doubt that the adoption of the Swiss rule by all the other civilised States would improve matters more than the universal adoption of the so-called Belgian *attentat* clause. The fact that, according to Swiss law, each case of complex political crime is unravelled, and obtains the verdict of an independent court according to the very circumstances, conditions, and requirements under which it occurred, is of the greatest value. It enables every case to be met in such a way as it deserves, without compromising the Government, and without sacrificing the principle of non-extradition of political criminals as a valuable rule. I

How to avoid Misapplication of the Principle of non-Extradition of Political Criminals.

¹ The eleven cases reported by Langhard, *op. cit.*, pp. 49-69, which had been decided by the Bundes-

gericht up to 1910, are very instructive.

cannot support the charge made by some writers¹ that the Swiss law is inadequate, because it does not give criteria for the guidance of the court in deciding whether extradition for complex crimes should be granted or not. In my opinion, the very absence of such criteria proves the superiority of the Swiss clause to the Belgian *attentat* clause. On the one hand, the latter is quite insufficient, for it is restricted to murder of heads of States and members of their families only. I see no reason why individuals guilty of any murder—as provided by the Russian proposal—or who have committed other crimes, such as arson, theft, and the like, should not be surrendered, in case the political motive or purpose of the crime is of no importance, in comparison with the crime itself. On the other hand, the Belgian clause goes too far, since exceptional cases of murder of heads of States from political motives, or for political purposes, might occur, which did not deserve extradition. The Swiss clause, however, with its absence of fixed distinctions between such complex crimes as are extraditable and such as are not, permits the consideration of the circumstances, conditions, and requirements of the case in which a complex crime was committed. It is true that the responsibility of the court of justice which has to decide whether such a complex crime is extraditable is great. But it is to be taken for granted that such court will give its decision with impartiality, fairness, and justice. And it need not be feared that such court will grant asylum to a murderer, incendiary, and the like, unless convinced that the deed was really political.

§ 340. Be that as it may, the present position is a danger to the very principle of non-extradition of political criminals. Under the influence of the excitement caused by numerous criminal attempts in the last

¹ See, for instance, Martitz, *op. cit.*, ii. pp. 533-539.

quarter of the nineteenth century, a few treaties were concluded which made a wide breach in this principle. Russia led the reaction. This Power in 1885 concluded treaties with Prussia and Bavaria which stipulated the extradition of all individuals who had made an attack on the life, the body, or the honour¹ of a monarch, or of a member of his family, or who had committed any kind of murder, or attempt to murder. And the extradition treaty between Russia and Spain of 1888 went even further, and abandoned the principle of non-extradition of political criminals altogether. Fortunately, the endeavour of Russia to abolish this principle altogether did not succeed, and changed events may herald a new policy for the future. In her extradition treaty with Great Britain of 1886 she had to adopt it without any restriction, and in her extradition treaties with some other States, such as Portugal in 1887, Luxemburg in 1892, the United States and Holland in 1893, she had to adopt it with a restrictive clause similar to the Belgian *attentat* clause.²

Reaction-
ary Extra-
dition
Treaties.

¹ Thus, even for *lèse-majesté* extradition had to be granted.

² On the Russian Extradition Law

of 1911, see Devogel in *R.I.*, 2nd Ser. xiv. (1912), pp. 187-193.

PART III

**ORGANS OF THE STATES FOR THEIR
INTERNATIONAL RELATIONS**

CHAPTER I

HEADS OF STATES, AND FOREIGN OFFICES

I

POSITION OF HEADS OF STATES ACCORDING TO INTERNATIONAL LAW

Hall, § 97—Phillimore, ii. §§ 101 and 102—Hershey, No. 256—Bluntschli, §§ 115-125—Holtzendorff in *Holtzendorff*, ii. pp. 77-81—Ullmann, § 40—Rivier, i. § 32—Nys, ii. pp. 378-382—Fiore, ii. No. 1097—Bonfils, No. 632—Mérignhac, ii. pp. 294-305—Bynkershoek, *De Foro Legatorum* (1721), c. iii. § 13—Satow, *Diplomatic Practice*, i. §§ 6-12.

§ 341. As a State is an abstraction from the fact that a multitude of individuals live in a country under a sovereign Government, every State must have a head as its highest organ, which represents it, within and without its borders, in the totality of its relations. Such head is the monarch in a monarchy, and a president, or a body of individuals, such as the Bundesrath of Switzerland, in a republic. The Law of Nations prescribes no rules as regards the kind of head a State may have. Every State is, naturally, independent regarding this point, and possesses the faculty of adopting any constitution it likes and of changing such constitution according to its discretion. Some kind or other of a head of the State is, however, necessary according to International Law, as without a head there is no State in existence, but anarchy.

Necessity
of a Head
for every
State.

Recogni-
tion of
Heads of
States.

§ 342. In case of the accession of a new head of a State, other States are, as a rule, notified. The latter usually recognise the new head through some formal act, such as a congratulation. But neither such notification, nor recognition, is strictly necessary according to International Law, as an individual becomes head of a State, not through the recognition of other States, but through Municipal Law. Such notification and recognition are, however, of legal importance.¹ For, through notification, a State declares that the individual concerned is its highest organ, and has, by Municipal Law, the power to represent the State in the totality of its international relations. And through recognition the other States declare that they are ready to negotiate with such individual as the highest organ of his State. But recognition of a new head by other States is in every respect a matter of discretion. A State has not the right to demand from other States recognition of its new head. Thus Russia, Austria, and Prussia refused until 1848 recognition to Isabella, Queen of Spain, who had come to the throne as an infant in 1833. Again, in 1914, the United States refused to recognise President Huerta of Mexico. But in the long run recognition cannot, in practice, be withheld, for without it international intercourse is impossible, and States with self-respect will exercise retorsion if recognition is refused to the heads they have chosen. Thus, when, after the unification of Italy in 1861, Mecklenburg and Bavaria refused to recognise Victor Emmanuel as King of Italy, Count Cavour revoked the *exequatur* of the consuls of these States in Italy.

But it must be emphasised that recognition of a new head of a State by no means implies the recognition of such head as the legitimate head of that State. Recognition is, in fact, nothing else than the declaration of

¹ See above, § 75.

other States that they are ready to deal with a certain individual as the highest organ of a particular State, without prejudice to the question whether such individual is, or is not, to be considered as the legitimate head of that State.

§ 343. The head of a State, as its chief organ and representative in the totality of its international relations, acts for his State in its international intercourse, with the consequence that all his legally relevant international acts are considered to be acts of his State. His competence to perform such acts is termed *jus repræsentationis omnimodæ*. It comprises insubstance chiefly: reception and mission of diplomatic agents and consuls, conclusion of international treaties, declaration of war, and conclusion of peace. But it is a question in each case how far this competence is independent of Municipal Law. For heads of States exercise this competence for their States, and as representing them, and not in their own right. If a head of a State should, for instance, ratify a treaty without the necessary approval of his Parliament, he would go beyond his powers, and therefore such a treaty would not be binding upon his State.¹

Competence of Heads of States.

On the other hand, this competence is certainly independent of the question whether a head of a State is the legitimate head or a usurper. The mere fact that an individual is for the time being the head of a State makes him competent to act as such, and his State is legally bound by his acts. It may, however, be difficult to decide whether a certain individual is, or is not, the head of a State, for after a revolution some time always elapses before matters are settled.

§ 344. Heads of States are never subjects² of the Law of Nations. The position which a head of a State

¹ See below, § 497.

² But Heffter (§ 48) maintains the contrary, and Phillimore (ii. § 100) designates monarchs *mediately and*

derivatively as subjects of International Law. The matter is treated in detail above, §§ 13 and 288-290; see also below, § 384.

Heads of States has according to International Law is due to him, not as
Objects of the Law of Nations. an individual, but as the head of his State. His position is derived from international rights and duties belonging to his State, and not from international rights of his own. Consequently, all rights possessed by heads of States abroad are not international rights, but rights which must be granted to them by the Municipal Law of the foreign State on whose territory they are temporarily staying, and such rights must be granted in compliance with international rights of the home States of the respective heads. Thus, heads of States are not subjects, but objects of International Law, and in this respect are like any other individual.

Honours and Privileges of Heads of States. § 345. All honours and privileges due to heads of States from foreign States are derived from the fact that dignity is a recognised quality of States as members of the Family of Nations and International Persons.¹ Concerning such honours and privileges, International Law distinguishes between monarchs and heads of republics. This distinction is the necessary outcome of the fact that the position of monarchs, according to the Municipal Law of monarchies, is totally different from the position of heads of republics, according to the Municipal Law of republics. For monarchs are sovereigns, but heads of republics are not.

II

MONARCHS

Vattel, i. §§ 38-45; iv. § 108—Hall, § 49—Lawrence, § 105—Phillimore, ii. §§ 103-113—Taylor, § 184—Moore, ii. § 250—Hershey, No. 281—Bluntschli, §§ 126-153—Heffter, §§ 48-57—Ullmann, §§ 41-42—Rivier, i. § 33—Nys, ii. pp. 331-348—Calvo, iii. §§ 1454-1479—Fiore, ii. Nos. 1098-1102—Bonfils, Nos. 633-647—Mérignhac, ii. pp. 294-314—Pradier-Fodéré, iii. Nos. 1564-1591—Praag, Nos. 191-202—Satow, *Diplomatic Practice*, i. §§ 6-12.

¹ See above, § 121.

§ 346. In every monarchy the monarch appears as the representative of the sovereignty of the State, and thereby becomes a sovereign himself; and this fact is recognised by International Law. And the difference between the Municipal Laws of the different States regarding this point matters in no way. Consequently, International Law recognises all monarchs as equally sovereign, although the difference between the constitutional positions of monarchs is enormous, if looked upon in the light of the rules laid down by the constitutional laws of the different States.

§ 347. Not much need be said as regards the consideration due to a monarch from other States when within the boundaries of his own State. Foreign States have to give him his usual and recognised predicates¹ in all official communications. Every monarch must be treated as a peer of other monarchs, whatever difference in title and actual power there may be between them.

§ 348. However, as regards the consideration due to a monarch abroad from the State on whose territory he is staying, in time of peace, and with the consent and the knowledge of the Government, details must necessarily be given. It consists of honours, inviolability, and extraterritoriality.

(1) In consequence of his character of sovereign, his home State has the right to demand that certain ceremonial honours should be rendered to him, to the members of his family, and to the members of his retinue. He must be addressed by his usual predicates. Military salutes must be paid to him, and the like.

(2) As his person is sacrosanct, his home State has a right to insist that he should be afforded special protection as regards personal safety, the maintenance of personal dignity, and unrestrained intercourse with his

Sovereignty of Monarchs.

Consideration due to Monarchs at Home.

Consideration due to Monarchs Abroad.

¹ Details as regards the predicates of monarchs are given above, § 119.

Government at home. Every offence against him must be visited with specially severe penalties. On the other hand, he must be exempt from every kind of criminal jurisdiction. The wife of a sovereign must be afforded the same protection and exemption.

(3) He must be granted so-called extritoriality conformably with the principle, *par in parem non habet imperium*, according to which one sovereign cannot have any power over another sovereign. He must, therefore, in every point be exempt from taxation, rating, and every fiscal regulation, and likewise from civil jurisdiction, except when he himself is the plaintiff.¹ The house where he has taken his residence must enjoy the same extritoriality as the official residence of an ambassador; no policeman, or other official, must be allowed to enter it without his permission. Even if a criminal takes refuge there, the police must be prevented from entering it, although, if the surrender of the criminal is deliberately refused, the Government may request the recalcitrant sovereign to leave the country, and then arrest the criminal. If a foreign sovereign has real property in a country, such property is under the jurisdiction of the latter. But as soon as such sovereign takes up his residence on the property, it must become extritorial for the time being. Further, a sovereign staying in a foreign country must be allowed to perform all his own governmental acts and functions, except when his country is at war with a third State, and the State in which he is staying remains neutral. And, lastly, a sovereign must be allowed, within the same limits as at home, to exercise civil jurisdiction over the members of his retinue. In

¹ *Hullet v. King of Spain*, (1828) 2 Bligh N.S. 310. See also above, § 115, and the cases there quoted; Phillimore, ii. § 113a; Loening, *Die Gerichtsbarkeit über fremde Staaten und Souveräne* (1903); and the *Projet*

de Règlement international sur la Compétence des Tribunaux dans les Procès contre les États souverains ou Chefs d'État étrangers, adopted by the Institute of International Law in 1891 (*Annuaire*, xi. (1892), p. 436).

former times, even criminal jurisdiction over the members of his suite was very often claimed and conceded, but this is now antiquated.¹ The wife of a sovereign must likewise be granted extritoriality, but not other members of a sovereign's family.²

However, extritoriality is in the case of a foreign sovereign, as in any other case, a fiction only, which is kept up, for certain purposes, within certain limits. Should a sovereign, during his stay within a foreign State, abuse his privileges, such State is not obliged to bear such abuse tacitly and quietly, but can request him to leave the country. And when a foreign sovereign commits acts of violence, or such acts as endanger the internal or external safety of the State, the latter can put him under restraint to prevent further acts of the same kind, but must at the same time bring him as speedily as possible to the frontier.

§ 349. The position of individuals who accompany a monarch during his stay abroad is a matter of some dispute. Several publicists maintain that the home State can claim the privilege of extritoriality for members of his suite as well as for the sovereign himself; but others deny this.³ I believe that the opinion of the former is correct, since I cannot see any reason why a sovereign abroad should, as regards the members of his suite, be in an inferior position to a diplomatic envoy.⁴

The
Retinue of
Monarchs
Abroad.

§ 350. Hitherto only the case where a monarch is staying in a foreign country with the official knowledge of the Government of the latter has been discussed.

Monarchs
travelling
Incognito.

¹ A celebrated case happened on November 10, 1657, in France, when Christina, Queen of Sweden, although she had already abdicated, sentenced her grand equerry, Monaldeschi, to death, and had him executed by her bodyguard.

² See Rivier, i. p. 421, and

Bluntschli, § 154; but, according to Bluntschli, extritoriality need not in strict law be granted even to the wife of a sovereign.

³ See Bluntschli, § 154, and Hall, § 49, in contradistinction to Martens, i. § 83.

⁴ See below, §§ 401-405.

Such knowledge may be possessed in the case of a monarch travelling *incognito*, and then he enjoys the same privileges as if travelling not *incognito*. The only difference is that many ceremonial observances, which are due to a monarch, are not rendered to him when travelling *incognito*. But the case may happen that a monarch is travelling in a foreign country *incognito* without the Government of the latter having the slightest knowledge thereof. He cannot then, of course, be treated otherwise than as any other foreign individual; but he can at any time make known his real character, and assume the privileges¹ due to him. Thus the late King William of Holland, when travelling *incognito* in Switzerland in 1873, was condemned to a fine for some slight contravention, but the sentence was not carried out, as he gave up his *incognito*.²

Deposed
and Abdi-
cated
Mon-
archs.

§ 351. All privileges mentioned must be granted to a monarch only as long as he is really the head of a State. As soon as he is deposed or has abdicated, he is no longer a sovereign. Therefore in 1870 and 1872 the French courts permitted, because she was deposed, civil actions against Queen Isabella of Spain, then living in Paris, for money due to the plaintiffs. Nothing, of course, prevents the Municipal Law of a State from granting the same privileges to a foreign deposed or abdicated monarch as to a foreign sovereign, but the Law of Nations does not exact any such courtesy.

Regents.

§ 352. All privileges due to a monarch are also due to a regent, at home or abroad, whilst he governs on behalf of an infant, or of a king who is, through illness, incapable of exercising his powers. And it matters not whether the regent is a member of the king's family and a prince of royal blood, or not.

¹ See *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149.

² See Lawrence, *Commentaire sur*

Wheaton, iii. p. 428; Pradier-Fodéré, iii. No. 1582, and *R.I.*, v. (1873), p. 246.

§ 353. When a monarch accepts any office in a foreign State, when, for instance, he serves in a foreign army, as did formerly many monarchs of the small German States, he submits to such State as far as the duties of the office are concerned, and his home State cannot claim any privileges for him that otherwise would be due to him.

Monarchs
in the
Service or
Subjects
of Foreign
Powers.

When a monarch is at the same time a subject of another State, a distinction must be made between his acts as a sovereign, on the one hand, and his acts as a subject, on the other. For the latter, the State whose subject he is has jurisdiction over him, but not for the former. Thus, in 1837, the Duke of Cumberland became King of Hanover, but at the same time he was by hereditary title an English peer and therefore an English subject. And in 1844, in the case of *Duke of Brunswick v. King of Hanover*,¹ the Master of the Rolls held that the King of Hanover was liable to be sued in the courts of England in respect of any acts done by him as an English subject.

III

PRESIDENTS OF REPUBLICS

Bluntschli, § 134—Stoerk in *Holtzendorff*, ii. p. 661—Ullmann, § 42—Rivier, i. § 33—Martens, i. § 80—Walther, *Das Staatshaupt in den Republiken* (1907), pp. 190-204—Praag, No. 192—Satow, *Diplomatic Practice*, i. § 9.

§ 354. In contradistinction to monarchies, in republics the people itself, and not a single individual, appears as the representative of the sovereignty of the State, and, accordingly, the people styles itself the sovereign of the State. And it will be remembered that the head

Presi-
dents not
Sove-
reigns.

¹ 6 Beav. 1 ; 2 H.L.C. 1 ; see also Phillimore, ii. § 109.

of a republic may consist of a body of individuals, such as the Bundesrath in Switzerland. But in case the head is a president, as in France and the United States of America, the president represents the State, at any rate in the totality of its international relations. He is, however, not a sovereign, but a citizen, and a subject of the very State of which, as president, he is head.

Position
of Presi-
dents in
general.

§ 355. Consequently, his position at home and abroad cannot be compared with that of monarchs, and International Law does not empower his home State to claim for him the same, but only similar, consideration as that due to a monarch. Neither at home nor abroad, therefore, does a president of a republic appear as a peer of monarchs. Whereas all monarchs are in the style of the court phraseology considered as though they were members of the same family, and therefore address each other in letters as 'my brother,' a president of a republic is usually addressed in letters from monarchs as 'my friend.' His home State can certainly claim at home and abroad such honours for him as are due to its dignity, but no such honours as must be granted to a sovereign monarch.

Position
of Presi-
dents
Abroad.

§ 356. As to the position of a president when abroad, writers on the Law of Nations do not agree. Some¹ maintain that, since a president is not a sovereign, his home State can never claim for him the same privileges as for a monarch, and especially that of extritoriality. Others² make a distinction whether a president is staying abroad in his official capacity as head of a State, or for his private purposes, and they maintain that his home State could only in the first case claim extritoriality for him. Others³ again will not admit any difference in the position of a president abroad from that of

¹ Ullmann, § 42; Rivier, i. p. 423; Stœrk in *Holtzendorff*, ii. p. 658.

² Martens, i. § 80; Bluntschli, § 134; Despagnet, No. 254; Hall,

§ 97.

³ Bonfils, No. 632; Nys, ii. p. 338; Mérignhac, ii. p. 298; Liszt, § 13; Walther, *op. cit.*, p. 195.

a monarch abroad. With regard to ceremonial honours due to a president when abroad on official business, when the President of the United States visited England in December 1918, he received such ceremonial honours as are due to a monarch. As regards exterritoriality, I believe that future contingencies will create the practice on the part of the States of granting this privilege to presidents and members of their suite as in the case of monarchs. I cannot see that there is any danger in such a grant. And nobody can deny that, if exterritoriality is not granted, all kinds of friction and even conflicts might arise. Although not sovereigns, presidents of republics fill, for the time being, a sublime office, and the grant of exterritoriality to them is a tribute paid to the dignity of the States they represent.

IV

FOREIGN OFFICES

Heffter, § 201—Geffcken in *Holtzendorff*, iii. p. 668—Ullmann, § 43—Rivier, i. § 34—Bonfils, Nos. 648-651—Nys, ii. pp. 383-387—Hershey, No. 257—Satow, *Diplomatic Practice*, i. §§ 13-20.

§ 357. As a rule nowadays no head of a State, be he a monarch or a president, negotiates directly, and in person, with a foreign Power, although this happens occasionally. The necessary negotiations are regularly conducted by the Foreign Office, an office which, since the Westphalian Peace, has been in existence in every civilised State. The chief of this office, the Secretary for Foreign Affairs, who is a Cabinet minister, directs the foreign affairs of the State in the name of the head and with his consent; he is the middleman between the head of the State and other States. And although many a head of a State in fact directs all the foreign affairs

Position
of the
Secretary
for
Foreign
Affairs.

himself, the Secretary for Foreign Affairs is nevertheless the person through whose hands all transactions must pass. Now, as regards the position of such Foreign Secretary at home, it is the Municipal Law of a State which regulates this. But International Law defines his position regarding international intercourse with other States. He is the chief over all the ambassadors of the State, over its consuls, and over its other agents in matters international. It is he who, either in person, or through the envoys of his State, approaches foreign States for the purpose of negotiating matters international. And, again, it is he whom foreign States, through their Foreign Secretaries or their envoys, approach for the like purpose. He is present when ministers hand in their credentials to the head of the State. All documents of importance regarding foreign matters are signed by him or his substitute, the Under-Secretary for Foreign Affairs. It is, therefore, usual to notify the appointment of a new Foreign Secretary of a State to such foreign States as are represented within its boundaries by diplomatic envoys; the new Foreign Secretary himself makes this notification.

CHAPTER II

DIPLOMATIC ENVOYS

I

THE INSTITUTION OF LEGATION

Grotius, ii. c. 18—Phillimore, ii. §§ 148-153—Taylor, § 274—Twiss, § 199—Geffcken in *Holtzendorff*, iii. pp. 605-618—Nys, ii. pp. 393-395—Rivier, i. § 35—Ullmann, § 44—Martens, ii. § 6—Gentilis, *De Legationibus Libri III.* (1585)—Wicquefort, *L'Ambassadeur et ses Fonctions* (1680)—Bynkershoek, *De Foro Legatorum* (1721)—Garden, *Traité complet de Diplomatie* (3 vols. 1833)—Miruss, *Das europäische Gesandtschaftsrecht* (2 vols. 1847)—Charles de Martens, *Le Guide diplomatique* (2 vols. 1832; 5th ed. by Geffcken, 1866)—Anonymous, *Embassies and Foreign Courts* (1855)—Montague Bernard, *Four Lectures on Subjects connected with Diplomacy* (1868), pp. 111-162 (3rd Lecture)—Alt, *Handbuch des europäischen Gesandtschaftsrechts* (1870)—Pradier-Fodéré, *Cours de Droit diplomatique* (2 vols. 2nd ed. 1899)—Krauske, *Die Entwicklung der ständigen Diplomatie*, etc. (1885)—Lehr, *Manuel théorique et pratique des Agents diplomatiques* (1888)—Hill, *History of Diplomacy in the International Development of Europe*, vol. i. (1905), vol. ii. (1906), vol. iii. (1914)—Foster, *The Practice of Diplomacy* (1906)—Week, *La Représentation diplomatique de la Suisse* (1911)—Satow, *Diplomatic Practice*, i. §§ 1-5, 89-96, 139-167.

§ 358. Legation, as an institution for the purpose of negotiating between different States, is as old as history, whose records are full of examples of legations sent and received by the oldest nations. And it is remarkable that even in antiquity, where no such law as the modern International Law was known, ambassadors everywhere enjoyed a special protection and certain privileges, although not by law but by religion, ambassadors being looked upon as sacrosanct. Yet per-

Develop-
ment of
Legations.

manent legations were unknown till very late in the Middle Ages. The fact that the Popes had permanent representatives—so-called *apocrisarii* or *responsales*—at the court of the Frankish kings and at Constantinople until the final separation of the Eastern from the Western Church, ought not to be considered as the first example of permanent legations, as the task of these papal representatives had nothing to do with international affairs, but with those of the Church only. It was not until the thirteenth century that the first permanent legations made their appearance. The Italian republics, and Venice in particular, set the example¹ by keeping representatives stationed at one another's capitals for the better negotiation of their international affairs. And in the fifteenth century these republics began to keep permanent representatives in Spain, Germany, France, and England. Other States followed the example. Special treaties were often concluded stipulating permanent legations, such as one in 1520, for instance, between the King of England and the Emperor of Germany. From the end of the fifteenth century England, France, Spain, and Germany kept up permanent legations at one another's courts. But it was not until the second half of the seventeenth century that permanent legations became a general institution, the Powers following the example of France under Louis XIV. and Richelieu. It ought to be specially mentioned that Grotius² thought permanent legations to be wholly unnecessary. The course of events has, however, shown that Grotius' views as regards permanent legations were short-sighted. Nowadays the Family of Nations could not exist without them, as they are the channel through which nearly the

¹ See Nys, *Les Origines du Droit international* (1894), p. 295.

² *De Jure Belli ac Pacis*, ii. c. 18, § 3: 'Optimo autem jure rejici

possunt, quae nunc in usu sunt legationes assiduae, quibus quam non sit opus docet mos antiquus, cui illae ignoratae.'

whole, and certainly all important, official intercourse of the States flows.

§ 359. The rise of permanent legations created the necessity for a new class of State officials, the so-called diplomatists; yet it was not until the end of the eighteenth century that the terms 'diplomatist' and 'diplomacy' came into general use. And although the art of diplomacy is as old as official intercourse between States, such a special class of officials as are now called diplomatists did not, and could not, exist until permanent legations had become a general institution. In this, as in other cases, the office has created the class of men necessary for it. International Law has nothing to do with the education and general character of these officials. Every State is naturally competent to create its own rules,¹ if any, as regards these points. Nor has International Law anything to do with *diplomatic usages*, although these are more or less of importance, as they may occasionally grow into customary rules of International Law. But I would notice one of these usages—namely, that as regards the *language* which is in use in diplomatic intercourse. This language was formerly Latin, but through the political ascendancy of France under Louis XIV. it became French. However, this is a usage of diplomacy only, and not a rule of International Law.² Each State can use its own language in all official communications to other States, and States which have the same language regularly do so in their intercourse with each other. But between States of different tongues and, further, at conferences and congresses, it is convenient to make use of a language which is generally known. This is nowadays French, but nothing could prevent diplomatists from dropping French at any moment and adopting another

Diplo-
macy.

¹ As to some of these, see Strupp in *Z.I.*, xxv. pp. 55-129.

² See Miruss, *Das europäische Gesandtschaftsrecht*, i. §§ 266-268.

language instead. Article 120 of the General Treaty of the Vienna Congress of 1815 expressly observes that the fact of the French language having been exclusively employed in all the copies of that treaty is not to be construed into a precedent for the future, and that every Power reserves to itself the right to adopt, in future negotiations and conventions, the language which it had previously employed in its diplomatic relations. And it should be specially noticed that at the Peace Conference at Paris in 1919, the English and French languages were treated on a footing of equality, and the English and French texts of the Treaty of Peace with Germany, which includes the Covenant of the League of Nations, are both authentic.

II

RIGHT OF LEGATION

Grotius, ii. c. 18—Vattel, iv. §§ 55-68—Hall, § 98—Phillimore, ii. §§ 115-139—Taylor, §§ 285-288—Twiss, §§ 201-202—Hershey, No. 258—Wheaton, §§ 206-209—Bluntschli, §§ 159-165—Heffter, § 200—Geffcken in *Holtzendorff*, iii. pp. 620-631—Ullmann, § 45—Rivier, i. § 35—Nys, ii. p. 392—Bonfils, Nos. 658-667—Pradier-Fodéré, iii. Nos. 1225-1256—Fiore, ii. Nos. 1112-1117—Calvo, iii. §§ 1321-1325—Martens, ii. §§ 7-8—Satow, *Diplomatic Practice*, i. §§ 207-220.

Concep-
tion of
Right of
Legation.

§ 360. Right of legation is the right of a State to send and receive diplomatic envoys. The right to send such envoys is termed *active* right of legation, in contradistinction to the *passive* right of legation, as the right to receive such envoys is termed. Some writers¹ on International Law assert that no right but a mere competence to send and receive diplomatic envoys exists according to International Law, maintaining that no State is bound by International Law to send or receive such envoys. But this is certainly wrong in its gener-

¹ See, for instance, Wheaton, § 207; Heilborn, *System*, p. 182.

ality. Obviously a State is not bound to send diplomatic envoys or to receive *permanent* envoys. But, on the other hand, the very existence¹ of the Family of Nations makes it necessary for the members, or some of the members, to negotiate occasionally on certain points. Such negotiation would be impossible in case one member could always, and under all circumstances, refuse to receive an envoy from the other members. The duty of every member to listen, under ordinary circumstances, to a message from another member brought by a diplomatic envoy is, therefore, an outcome of its very membership of the Family of Nations, and this duty corresponds to the right of every member to send such envoys. But the exercise of the active right of legation is discretionary. No State need send diplomatic envoys at all, although practically all States do at least occasionally send such envoys, and most States send permanent envoys to many other States. The passive right of legation is discretionary as regards the reception of *permanent* envoys only.

The League of Nations, being an International Person *sui generis*, possesses the right of legation, although it is not a State.

§ 361. Not every State possesses the right of legation. This right belongs chiefly to full sovereign States,² for other States possess it under certain conditions only.

What States possess the Right of Legation.

(1) Half sovereign States, such as States under the suzerainty, or the protectorate, of another State, can, as a rule, neither send nor receive diplomatic envoys. Thus Egypt is destitute of such a right, and the Powers are represented there only by consuls. But there may

¹ See above, § 141.

² It should be emphasised that the Holy See, which is in some respects treated as though an International Person, can send and receive envoys, who must in every respect be considered as though they were diplo-

matic envoys. That they are actually not diplomatic envoys, although so treated, becomes apparent from the fact that they are not agents for international affairs of States, but exclusively for affairs of the Roman Catholic Church. See above, § 106.

be exceptions to this rule. Thus, according to the Peace Treaty of Kainardgi of 1774 between Russia and Turkey, the two half sovereign principalities of Moldavia and Wallachia had the right of sending *chargés d'affaires* to foreign Powers. Thus, further, before the Boer War, the South African Republic, which was, in the opinion of Great Britain, a State under British suzerainty, used to keep permanent diplomatic envoys in several foreign States.

(2) Part sovereign member-States of a Federal State may, or may not, have the right of legation as well as the Federal State. It is the constitution of the Federal State which regulates this point. Thus, the member-States of Switzerland and of the United States of America have no right of legation, but those of the German Empire before the World War certainly had. Bavaria, for example, used to send and receive several diplomatic envoys.

Right of
Legation,
by whom
exercised.

§ 362. As, according to International Law, a State is represented in its international relations by its head, its right of legation is exercised through him. But just as Municipal Law designates the person who is the head of the State, so it may impose certain conditions and restrictions upon him as regards the exercise of this right. And the head himself may, provided that it is sanctioned by the Municipal Law of his State, delegate¹ the exercise of this right to any representative he chooses.

It may, however, in consequence of revolutionary movements, be doubtful who is the real head of a State, and in such cases it remains in the discretion of foreign States to make their choice. But it is impossible for foreign States to receive diplomatic envoys from both claimants to the headship of the same State, or to send

¹ See Phillimore, ii. §§ 126-129, where several interesting cases of such delegation are discussed.

diplomatic envoys to both of them. And as soon as a State has recognised the head of a State who came into his position through a revolution, it can no longer keep up diplomatic relations with the former head.

It should be mentioned that a revolutionary party which is recognised as a belligerent Power has nevertheless no right of legation, although foreign States may negotiate with it in an informal way through political agents without diplomatic character, to provide for the temporary security of the persons and property of their subjects within the territory under the actual sway of such a party. A revolutionary party which is recognised as a belligerent Power is, in some points only, treated as though it were a subject of International Law; but it is not a State, and there is no reason why International Law should give it the right to send and receive diplomatic envoys.

It should further be mentioned that neither an abdicated, nor a deposed, head has a right to send or receive diplomatic envoys.¹

III

KINDS AND CLASSES OF DIPLOMATIC ENVOYS

Vattel, iv. §§ 69-75—Phillimore, ii. §§ 211-226—Twiss, i. §§ 204-209—Hershey, No. 261—Moore, iv. § 624—Heffter, § 208—Geffcken in *Holtzendorff*, iii. pp. 635-646—Calvo, iii. §§ 1326-1336—Bonfils, Nos. 668-676—Pradier-Fodéré, iii. §§ 1277-1290—Rivier, i. pp. 443-453—Nys, ii. pp. 396-400—Satow, *Diplomatic Practice*, i. §§ 263-277.

§ 363. Two different kinds of diplomatic envoys are to be distinguished—namely, such as are sent for political negotiations, and such as are sent for the purpose of ceremonial function or notification of changes in the

Envoys
Cere-
monial
and
Political.

¹ See Phillimore, ii. §§ 124-125, ambassador of Mary Queen of Scots, where the case of *Bishop Ross*, is discussed.

headship. For States very often send special envoys to one another on occasions of coronations, weddings, funerals, jubilees, and the like ; and it is also usual to send envoys to announce a fresh accession to the throne. Such envoys ceremonial have the same standing as envoys political for real State negotiations. Among the envoys political, again, two kinds are to be distinguished—namely (1), such as are permanently or temporarily accredited to a State for the purpose of negotiating with such State, and (2), such as are sent to represent the sending State at a congress or conference. The latter are not, or need not be, accredited to the State on whose territory the congress or conference takes place, but they are nevertheless diplomatic envoys, and enjoy all the privileges of such envoys as regards exterritoriality and the like which concern the inviolability and safety of their persons and the members of their suites.

Classes
of Diplo-
matic
Envoys.

§ 364. Diplomatic envoys accredited to a State or to the League of Nations differ in class. These classes did not exist in the early stages of International Law. But during the sixteenth century a distinction between two classes of diplomatic envoys gradually arose, and at about the middle of the seventeenth century, after permanent legations had come into general vogue, two such classes became generally recognised—namely, extraordinary envoys, called Ambassadors, and ordinary envoys, called Residents ; Ambassadors being received with higher honours and taking precedence of the other envoys. Disputes arose frequently regarding precedence, and the States tried in vain to avoid them by introducing during the eighteenth century another class—namely, the so-called Ministers Plenipotentiary. At last the Powers assembled at the Vienna Congress came to the conclusion that the matter ought to be settled by an international understanding, and they agreed, therefore, on March 19, 1815, upon the establishment

of three different classes—namely, first, Ambassadors ; second, Ministers Plenipotentiary and Envoys Extraordinary ; third, *Chargés d’Affaires*. And the five Powers assembled at the Congress of Aix-la-Chapelle in 1818 agreed upon a fourth class—namely, Ministers Resident, to rank between Ministers Plenipotentiary and *Chargés d’Affaires*. All the other States either expressly or tacitly accepted these arrangements, so that nowadays the four classes are an established order. Although their privileges are materially the same, they differ in rank and honours, and they must therefore be treated separately.

§ 365. Ambassadors form the first class. Only the League of Nations and States enjoying royal honours ¹ are entitled to send and to receive Ambassadors, as also is the Holy See, whose first-class envoys are called *Nuncios*, or *Legati a latere* or *de latere*.² Ambassadors are considered to be personal representatives of the heads of their States, and enjoy, for this reason, special honours. Their chief privilege—namely, that of negotiating with the head of the State personally—has, however, little value nowadays, as all States have, to a certain extent, constitutional government, and this necessitates that all the important business should go through the hands of a Foreign Secretary. Ambassadors can also claim the title of ‘Excellency,’ and it is asserted that they can at all times ask for an audience from the head of the State to whom they are accredited.

§ 366. The second class, the Ministers Plenipotentiary and Envoys Extraordinary, to which also belong the Papal Internuncios, are not considered to be personal representatives of the heads of their States. Therefore they do not enjoy all the special honours of

Ambas-
sadors.

Ministers
Pleni-
potentiary
and
Envoys
Extra-
ordinary.

¹ See above, § 117 (1).

² There is no difference in rank between *Nuncios* and *Legati a latere*

or *de latere*. A *legatus a latere* or *de latere* is a Papal envoy who is a Cardinal, whereas a *Nuncio* is not a Cardinal.

the Ambassadors, have not the privilege of treating with the head of the State personally, and cannot at all times ask for an audience with him. But otherwise there is no difference between these two classes, except that Ministers Plenipotentiary receive the title of 'Excellency,' by courtesy only, and not by right.

Ministers
Resident.

§ 367. The third class, the Ministers Resident, enjoy fewer honours, and rank below the Ministers Plenipotentiary. But beyond the fact that Ministers Resident do not enjoy the title 'Excellency,' even by courtesy, there is no difference between them and the Ministers Plenipotentiary.

Chargés
d'Affaires.

§ 368. The fourth class, the Chargés d'Affaires, differs chiefly in one point from the first, second, and third class—namely, in that they are accredited from Foreign Office to Foreign Office, whereas the other classes are accredited from head of State to head of State. Chargés d'Affaires do not enjoy, therefore, so many honours as other diplomatic envoys.

A distinction ought to be made between a Chargé d'Affaires who is the head of a legation, and who, therefore, is accredited from Foreign Office to Foreign Office, and a Chargé d'Affaires *ad interim*. The latter is a member of a legation whom the head of the legation delegates for the purpose of taking his place during absence on leave. Such Chargé d'Affaires *ad interim*, who had better be called a Chargé des Affaires,¹ ranks below the ordinary Chargé d'Affaires; he is not accredited from Foreign Office to Foreign Office, but is simply a delegate of the absent head of the legation.

The Di-
plomatic
Corps.

§ 369. All the diplomatic envoys accredited to the same State form, according to a diplomatic usage, a body which is styled the 'Diplomatic Corps.' The head of this body, the so-called 'Doyen,' is the Papal Nuncio, or, in case there is no Nuncio accredited, the

¹ See Rivier, i. pp. 451-452.

oldest Ambassador, or, failing Ambassadors, the oldest Minister Plenipotentiary, and so on. As the Diplomatic Corps is not a body legally constituted, it performs no legal functions, but it is nevertheless of great importance, as it watches over the privileges and honours due to diplomatic envoys.

IV

APPOINTMENT OF DIPLOMATIC ENVOYS

Vattel, iv. § 76-77—Phillimore, ii. §§ 227-231—Twiss, i. §§ 212-214—Ullmann, § 48—Calvo, iii. §§ 1343-1345—Nys, ii. p. 402—Bonfils, Nos. 677-680—Wheaton, §§ 217-220—Moore, iv. §§ 632-635—Hershey, Nos. 262-265—Satow, *Diplomatic Practice*, i. §§ 221-242.

§ 370. International Law has no rules as regards the qualification of the individuals whom a State can appoint as diplomatic envoys, States being naturally competent to act according to discretion, although of course there are many qualifications a diplomatic envoy must possess to fill his office successfully. The Municipal Laws of many States comprise, therefore, many details as regards the knowledge and training which a candidate for a permanent diplomatic post must possess, whereas, regarding envoys ceremonial, even the Municipal Laws have no provisions at all. The question is sometimes discussed whether females¹ might be appointed envoys. History relates a few cases of female diplomatists. Thus, for example, Louis XIV. of France accredited in 1646 Madame de Guébriant ambassador to the court of Poland. During the last two centuries, however, no such case has to my knowledge occurred, although I doubt not that International Law does not prevent a

Person
and Quali-
fication of
the
Envoy.

¹ See Miruss, *Das europäische Gesandtschaftsrecht*, i. §§ 127-128; *Embassies and Foreign Courts* (Anon.), pp. 102-109; Phillimore,

ii. § 134; and Focherini, *Le Signore Ambasciatrici dei Secoli xvii. e xviii. e loro Posizione nel Diritto diplomatico* (1909).

State from sending a female as diplomatic envoy. But under the present circumstances many States would refuse to receive her.

Letter of
Credence,
Full
Powers,
Pass-
ports.

§ 371. The appointment of an individual as a diplomatic envoy is announced to the State to which he is accredited in certain official papers to be handed in by the envoy to the receiving State. *Letter of Credence* (*lettre de créance*) is the designation of the document in which the head of the State accredits a permanent ambassador or minister to a foreign State. Every such envoy receives a sealed letter of credence, and an open copy. As soon as he arrives at his destination, he sends the copy to the Foreign Office in order to make his arrival known. The sealed original, however, is handed personally by the envoy to the head of the State to whom he is accredited. *Chargés d'affaires* receive a letter of credence too, but as they are accredited from Foreign Office to Foreign Office, their letter of credence is signed, not by the head of their home State, but by its Foreign Office. Now a permanent diplomatic envoy needs no other empowering document if he is not entrusted with any task outside the limits of the ordinary business of a permanent legation. But in case he is entrusted with any such task, as, for instance, if any special treaty or convention is to be negotiated, he requires a special empowering document—namely, so-called *Full Powers* (*pleins pouvoirs*). These are given in letters patent signed by the head of the State, and they are either limited or unlimited full powers, according to the requirements of the case. Such diplomatic envoys as are sent, not to represent their home State permanently, but on an extraordinary mission such as representation at a congress, negotiation of a special treaty, and other transactions, receive full powers only, and no letter of credence. Every permanent or other diplomatic envoy is also furnished with so-called *In-*

structions for the guidance of his conduct as regards the objects of his mission. But such instructions are a matter between the envoy and his home State exclusively, and therefore, although they may otherwise be very important, they have no importance for International Law. Lastly, every permanent diplomatic envoy receives *passports* for himself and his suite, specially made out by the Foreign Office. These passports he deposits after his arrival at the Foreign Office of the State to which he is accredited, where they remain until he himself asks for them because he desires to leave his post, or until they are returned to him on his dismissal.

§ 372. As a rule, a State appoints different individuals as permanent diplomatic envoys to different States; but sometimes a State appoints the same individual as permanent diplomatic envoy to several States. Moreover, as a rule, a diplomatic envoy represents one State only. But occasionally several States appoint the same individual as their envoy, so that one envoy represents several States.

§ 373. In former times States used frequently¹ to appoint more than one permanent diplomatic envoy as their representative in a foreign State. Although this would hardly occur nowadays, there is no rule against such a possibility. And even now it happens frequently that States appoint several envoys for the purpose of representing them at congresses and conferences. In such cases one of the several envoys is appointed senior, and the others are subordinate to him.

¹ See Miruss, *op. cit.*, i. §§ 117-119.

Combined
Legations.

Appointment of
Several
Envoys.

V

RECEPTION OF DIPLOMATIC ENVOYS

Vattel, iv. §§ 65-67—Hall, § 98—Phillimore, ii. §§ 133-139—Twiss, i. §§ 202-203—Taylor, §§ 285-290—Moore, iv. §§ 635, 637-638—Hershey, Nos. 259 and 266—Martens, ii. § 8—Calvo, iii. §§ 1353-1356—Pradier-Fodéré, iii. §§ 1253-1260—Fiore, ii. Nos. 1118-1120, 1124—Rivier, i. pp. 455-457—Nys, ii. pp. 400-402—Satow, *Diplomatic Practice*, i. §§ 243-262.

Duty to
receive
Diplo-
matic
Envoys.

§ 374. Every member of the Family of Nations that possesses the passive right of legation is, under ordinary circumstances, bound to receive diplomatic envoys accredited to itself from other States for the purpose of negotiation. But this duty extends neither to the reception of permanent envoys, nor to the reception of temporary envoys under all circumstances.

(1) As regards permanent envoys, it is generally recognised that a State is as little bound to receive them as it is to send them. In practice, however, every full sovereign State which desires its voice to be heard among the States receives, and sends, permanent envoys, as without such it would, under present circumstances, be impossible for a State to have any influence whatever in international affairs. It is for this reason that Switzerland, which in former times abstained entirely from sending permanent envoys, has abandoned her former practice, and nowadays sends, and receives, several. The insignificant Principality of Lichtenstein is, as far as I know, the only full sovereign State which neither sends nor receives one single permanent legation.

But a State may receive a permanent legation from one State, and refuse to do so from another. Thus, the Protestant States never *received* a permanent legation from the Popes, even when the latter were heads of a State, and they still observe this rule, although some keep a permanent legation at the Vatican.

(2) As regards temporary envoys, it is likewise generally recognised among those writers who assert the duty of a State to receive temporary envoys under ordinary circumstances that there are exceptions to that rule. Thus, for example, a State which knows beforehand the object of a mission, and does not wish to negotiate thereon, can refuse to receive the mission. Thus, further, a belligerent can refuse¹ to receive a legation from the other belligerent, as war involves the rupture of all peaceable relations.

§ 375. But the refusal to receive an envoy must not be confounded with the refusal to receive a certain individual as envoy. A State may be ready to receive a permanent or temporary envoy, but may object to the individual selected for that purpose. International Law gives no right to a State to insist upon the reception of an individual appointed by it as diplomatic envoy. Every State can refuse to receive as envoy a person objectionable to itself. And a State refusing an individual envoy is neither compelled to specify what kind of objection it has, nor to justify its objection. Thus, for example, most States refuse to receive one of their own subjects as an envoy from a foreign State.² Thus, again, the King of Hanover refused in 1847 to receive Count von Westphalen as minister from Prussia, because he was of the Roman Catholic faith. Italy refused in 1885 to receive Mr. Keiley as ambas-

Refusal to
receive a
certain
Indi-
vidual.

¹ But this is not generally recognised. See Vattel, iv. § 67; Phillimore, ii. § 138; and Pradier-Fodéré, iii. No. 1255.

² In case a State receives one of its own subjects as diplomatic envoy of a foreign State, it has to grant him all the privileges of such envoys, including extraterritoriality. Thus in the case of *Macartney v. Garbutt*, (1890) 24 Q.B.D. 368, it was decided that a British subject accredited to Great Britain by the Chinese Govern-

ment as a secretary to its embassy, and received by Great Britain in that capacity, without an express condition that he should remain subject to British jurisdiction, was exempt from British jurisdiction. See, however, Article 15 of the 'Règlement sur les Immunités Diplomatiques,' adopted in 1895 by the Institute of International Law (*Annuaire*, xiv. p. 241), which denies to such an individual exemption from jurisdiction. See also Phillimore, ii. § 135, Twiss, i. § 203, and Praag, No. 70.

sador of the United States of America, because he had, in 1871, protested against the annexation of the Papal States. And when the United States sent the same gentleman as ambassador to Austria, the latter refused him reception on the ground that his wife was said to be a Jewess. Although, as is apparent from these examples, no State has a right to insist upon the reception of a certain individual as envoy, in practice States are often offended when reception is refused. Thus, in 1832 England did not cancel for three years the appointment of Sir Stratford Canning as ambassador to Russia, although the latter refused reception, and the post was practically vacant. In 1885, when, as above mentioned, Austria refused reception to Mr. Keiley as ambassador, the United States did not appoint another, although Mr. Keiley resigned, and the legation was for several years left to the care of a *chargé d'affaires*.¹ To avoid such conflicts, many States adopt the good practice of never appointing an individual as envoy without having ascertained beforehand whether he would be *persona grata*. And it is a customary rule of International Law that a State which does not object to the appointment of a certain individual, when its opinion has been asked beforehand, is bound to receive such individual.² The acceptance of a proposal to appoint a certain individual as envoy is called *agrédation*.

Mode and
Solemnity
of Recep-
tion.

§ 376. In case a State does not object to the reception of a person as diplomatic envoy accredited to itself, his actual reception takes place as soon as he has arrived at the place of his designation. But the mode of reception differs according to the class to which the envoy belongs. If he be one of the first, second, or third class,

¹ See Moore, iv. § 638, p. 480.

² The question is of interest whether the privileges due to envoys must be granted on his journey home

to an individual to whom reception as an envoy is refused. I think the question ought to be answered in the affirmative; see, however, Moore, iv. § 666, p. 668.

it is the duty of the head of the State to receive him solemnly in an audience with all the usual ceremonies. For that purpose the envoy sends a copy of his credentials to the Foreign Office, which arranges for him a special audience with the head of the State, when he delivers in person his sealed credentials.¹ If the envoy be a *chargé d'affaires* only, he is received in audience by the Secretary for Foreign Affairs, to whom he hands his credentials. Through formal reception the envoy becomes officially recognised, and can officially commence to exercise his functions. But those of his privileges (extritoriality and the like) which concern the safety and inviolability of his person must be granted even before his official reception, as his character as diplomatic envoy is considered to date, not from the time of his official reception, but from the time when his credentials were handed to him on leaving his home State, his passports furnishing sufficient proof of his diplomatic character.

§ 377. It must be specially observed that all these details regarding the reception of diplomatic envoys accredited to a State do not apply to the reception of envoys sent to represent the several States at a congress or conference, or at the seat of the League of Nations. As such envoys are not accredited to the State on whose territory the congress or conference takes place, or the League of Nations is established, that State has no competence to refuse the reception of the appointed envoys, and no formal and official reception of the latter by the head of the State need take place. The appointing States merely notify the appointment of their envoys to the Foreign Office of the State on whose territory the transactions take place, the envoys call upon the Foreign Secretary after their arrival to introduce themselves,

Reception
of Envoys
to Con-
gresses
and Con-
ferences,
and to the
League of
Nations.

¹ Details concerning reception of envoys are given by Twiss, i. § 215, and Rivier, i. p. 467.

and they are courteously received by him. They do not, however, hand to him their full powers, but reserve them for the first meeting of the congress or conference, where they produce them to one another, or to the Secretariat of the League of Nations.

VI

FUNCTIONS OF DIPLOMATIC ENVOYS

Rivier, i. § 37—Ullmann, § 49—Bonfils, Nos. 681-683—Pradier-Fodéré, iii. §§ 1346-1376—Hershey, No. 260.

On Diplo-
matic
Functions
in
general.

§ 378. A distinction must be made between the functions of permanent envoys and those of envoys for temporary purposes. The functions of the latter, who are either envoys ceremonial or envoys political only temporarily accredited for the purpose of some definite negotiations, or as representatives at congresses and conferences, are clearly demonstrated by the very purpose of their appointment. But the functions of the permanent envoys demand closer consideration. Their regular functions may be grouped together under the heads of negotiation,¹ observation, and protection. But besides these regular functions, a diplomatic envoy may be charged with other and more miscellaneous functions.

Negotia-
tion.

§ 379. A permanent ambassador or other envoy represents his home State in the totality of its international relations, not only with the State to which he is accredited but also with other States. He is the mouthpiece of the head of his home State and its Foreign Secretary, as regards communications to be made to the State to

¹ Negotiation is here used in the wider sense of the term, comprising every diplomatic communication from one State to another. In its narrower

sense it comprises only such intercourse between States as is directed towards securing an understanding. See below, § 477.

which he is accredited. He likewise receives communications from the latter, and reports them to his home State. In this way, not only are international relations between these two States fostered and negotiated, but also such international affairs of other States as are of general interest to all, or a part of, the members of the Family of Nations are discussed. Owing to the fact that all the more important Powers keep permanent legations accredited to one another, a constant exchange of views in regard to affairs international is taking place between them.

§ 380. But these are not all the functions of permanent diplomatic envoys. Their task is, further, to observe attentively every occurrence which might affect the interest of their home States, and to report such observations to their Governments. It is through these reports that every member of the Family of Nations is kept well informed in regard to the army and navy, the finances, the public opinion, and the commerce and industry of foreign countries. And it must be specially observed that no State that receives diplomatic envoys has a right to prevent them from exercising their function of observation. Observa-
tion.

§ 381. A third task of diplomatic envoys is the protection of the persons, property, and interests of such subjects of their home States as are within the boundaries of the State to which they are accredited. If such subjects are wronged without being able to find redress in the ordinary way of justice, and if they ask help of the diplomatic envoy of their home State, he must be allowed to afford them protection. It is, however, for the Municipal Law and regulations of his home State, and not for International Law, to prescribe the limits within which an envoy has to afford protection to his compatriots. Protec-
tion.

§ 382. Negotiation, observation, and protection are

Miscellaneous
Functions.

tasks common to all diplomatic envoys of every State. But a State may order its permanent envoys to perform other tasks, such as the registration of deaths, births, and marriages of subjects of the home State, legalisation of their signatures, issue of passports for them, and the like. But in doing this, a State must be careful not to order its envoys to perform tasks which are by the law of the receiving State exclusively reserved to its own officials. Thus, for instance, a State whose laws compel persons who intend marriage to conclude it in the presence of its registrars, need not allow a foreign envoy to legalise a marriage of compatriots before its registration by the official registrar. So, too, a State need not allow a foreign envoy to perform an act which is reserved for its jurisdiction, as, for instance, the examination of witnesses on oath.

Envoys
not to
interfere
in Internal
Politics.

§ 383. But it must be specially emphasised that envoys must not interfere with the internal political life of the State to which they are accredited. It certainly belongs to their functions to watch political events and political parties with a vigilant eye, and to report their observations to their home States. But they have no right whatever to take part in that political life, to encourage one political party, or to threaten another. If they do so, they abuse their position. And it matters not whether an envoy acts thus on his own account, or on instructions from his home State. No strong self-respecting State will allow a foreign envoy to exercise such interference, but will either request his home State to recall him and appoint another individual in his place, or, in case his interference is very flagrant, hand him his passports and therewith dismiss him. History records many instances of this kind,¹ although

¹ See Hall (§ 98**), Taylor (§ 322), and Moore (iv. § 640), who discuss a number of cases, especially that of Lord Sackville, who received his

passports in 1888 from the United States of America for an alleged interference in the presidential election.

in many cases it is doubtful whether the envoy concerned really abused his office for the purpose of interfering with internal politics.

VII

POSITION OF DIPLOMATIC ENVOYS

§ 384. Diplomatic envoys are just as little subjects of International Law as are heads of States; and the arguments used regarding the position of such heads¹ must also be applied to the position of diplomatic envoys. This position is given to them by International Law, not as individuals, but as representative agents of their States. It is derived, not from personal rights, but from rights and duties of their home States and the receiving States. All the privileges which, according to International Law, are possessed by diplomatic envoys are not rights given to them by International Law, but rights given by the Municipal Law of the receiving States in compliance with an international right belonging to their home States. For International Law gives a right to every State to demand for its diplomatic envoys certain privileges from the Municipal Law of a foreign State. Thus, a diplomatic envoy is not a subject, but an object of International Law, and is, in this regard, like any other individual.

§ 385. Privileges due to diplomatic envoys, apart from ceremonial honours, have reference to their inviolability and to their so-called extritoriality. The reasons why these privileges must be granted are that diplomatic envoys are representatives of States and of their dignity,² and, further, that they could not exercise their functions perfectly unless they enjoyed such

Diplo-
matic
Envoys
Objects of
Inter-
national
Law.

Privileges
due to
Diplo-
matic
Envoys.

¹ See above, § 344.

² See above, § 121.

privileges. For it is obvious that, were they liable to ordinary legal and political interference like other individuals, and thus more or less dependent on the goodwill of the Government, they might be influenced by personal considerations of safety and comfort to a degree which would materially hamper them in the exercise of their functions. It is equally clear that if their full and free intercourse with their home States through letters, telegrams, and couriers were liable to interference, the objects of their mission could not be fulfilled. In this case it would be impossible for them to send independent and secret reports to, or receive similar instructions from, their home States. From the consideration of these, and various cognate reasons, their privileges seem to be inseparable attributes of the very existence of diplomatic envoys.¹

VIII

INVIOABILITY OF DIPLOMATIC ENVOYS

Grotius, ii. c. 18, § 4—Vattel, iv. §§ 80-107—Hall, §§ 50, 98*—Phillimore, ii. §§ 154-175—Twiss, i. §§ 216-217—Moore, iv. §§ 657-659—Hershey, Nos. 271-274—Ullmann, § 50—Geffcken in *Holtzendorff*, iii. pp. 648-653—Rivier, i. § 38—Nys, ii. pp. 425-428—Bonfils, Nos. 684-699—Pradier-Fodéré, iii. §§ 1382-1393—Mérignhac, ii. pp. 264-273—Fiore, ii. Nos. 1127-1143—Calvo, iii. §§ 1480-1498—Martens, ii. § 11—Crouzet, *De l'Inviolabilité . . . des Agents diplomatiques* (1875)—Praag, No. 205—Satow, *Diplomatic Practice*, i. §§ 279-311.

Protec-
tion due
to Diplo-
matic
Envoys.

§ 386. Diplomatic envoys are just as sacrosanct as heads of States. They must, therefore, be afforded special protection as regards the safety of their persons, and be exempted from every kind of criminal jurisdiction by the receiving States. The protection due to diplomatic envoys must find its expression, not

¹ The Institute of International Law, at its meeting at Cambridge in 1895, discussed the privileges of

diplomatic envoys, and drafted a body of seventeen rules in regard thereto; see *Annuaire*, xiv. p. 240.

only in the necessary police measures for the prevention of offences, but also in specially severe punishments for offenders. Thus, according to English Criminal Law,¹ every one is guilty of a misdemeanour who, by force or personal restraint, violates any privilege conferred upon the diplomatic representatives of foreign countries, or who sets² forth or prosecutes or executes any writ or process whereby the person of any diplomatic representative of a foreign country, or the person of a servant of any such representative, is arrested or imprisoned. The protection of diplomatic envoys is not restricted to their own person, but must be extended to the members of their family and suite, to their official residence, their furniture, carriages, papers, and likewise to their intercourse with their home States by letters, telegrams, and special messengers. Even after a diplomatic mission has come to an end, the archives of an embassy must not be touched, provided they have been put under seal and confided to the protection of another envoy.³

§ 387. As regards the exemption of diplomatic envoys from criminal jurisdiction, the theory and practice of International Law agree nowadays⁴ that the receiving States have no right, under any circumstances whatever, to prosecute and punish diplomatic envoys. But among writers on International Law the question is not settled whether the commands and injunctions of the laws of the receiving States concern diplomatic envoys at all, so that they must comply with them, although it is admitted that they can never be prosecuted and punished

Exemption from Criminal Jurisdiction.

¹ See Stephen's *Digest*, Articles 96-97.

² 7 Anne, c. 12, §§ 3-6. This statute, which was passed in 1708 in consequence of the Russian ambassador in London having been arrested for a debt of £300, has always been considered as declaratory

of the existing law in England, and not as creating new law.

³ See above, § 106 (case of *Montagnini*), and below, § 411.

⁴ In former times there was no unanimity amongst publicists. See Phillimore, ii. § 156.

for any breach.¹ This question ought to be decided in the negative, for a diplomatic envoy must in no respect be considered to be under the legal authority of the receiving State. But this does not mean that a diplomatic envoy must have a right to do what he likes. The presupposition of the privileges he enjoys is that he acts and behaves in such a manner as harmonises with the internal order of the receiving State. He is therefore expected voluntarily to comply with all such commands and injunctions of the Municipal Law as do not restrict him in the effective exercise of his functions. In case he acts and behaves otherwise, and disturbs the internal order of the State, the latter will certainly request his recall, or send him back at once.

History records many cases of diplomatic envoys who have conspired against the receiving States, but have nevertheless not been prosecuted. Thus, in 1584, the Spanish ambassador in England, Mendoza, plotted to depose Queen Elizabeth; he was ordered to leave the country. In 1587 the French ambassador in England, L'Aubespine, conspired against the life of Queen Elizabeth; he was simply warned not to commit a similar act again. In 1654 the French ambassador in England, De Bass, conspired against the life of Cromwell; he was ordered to leave the country within twenty-four hours.²

Limita-
tion of
Inviolability.

§ 388. As diplomatic envoys are sacrosanct, the principle of their inviolability is generally recognised. But there is one exception. For if a diplomatic envoy commits an act of violence which disturbs the internal order of the receiving State in such a manner as makes it necessary to put him under restraint for the purpose of preventing similar acts, or if he conspires against the receiving State and the conspiracy can be made

¹ The point is thoroughly discussed by Beling, *Die strafrechtliche Bedeutung der Exterritorialität* (1896), pp. 71-90.

² These and other cases are discussed by Phillimore, ii. §§ 160-165.

futile only by putting him under restraint, he may be arrested for the time being, although he must in due time be safely sent home. Thus in 1717 the Swedish ambassador, Gyllenburg, in London, who was an accomplice in a plot against King George I., was arrested, and his papers were searched. In 1718 the Spanish ambassador in France, Prince Cellamare, was placed in custody, because he organised a conspiracy against the French Government.¹ It must be emphasised that a diplomatic envoy cannot complain if he is injured in consequence of his own unjustifiable behaviour, as for instance in attacking an individual who in self-defence retaliates, or in unreasonably or wilfully placing himself in dangerous or awkward positions, such as in a disorderly crowd.²

IX

EXTRITERRITORIALITY OF DIPLOMATIC ENVOYS

Grotius, ii. c. 18, §§ 9 and 10—Vattel, iv. §§ 80-119—Hall, §§ 50, 52, 53—Westlake, i. pp. 273-283—Phillimore, ii. §§ 176-210—Taylor, §§ 299-315—Twiss, i. §§ 217-221—Moore, ii. §§ 291-304, and iv. §§ 660-669—Hershey, Nos. 270 and 275-280—Ullmann, § 50—Geffcken in *Holtzendorff*, iii. pp. 654-659—Nys, ii. pp. 406-433—Rivier, i. § 38—Bonfils, Nos. 700-721—Pradier-Fodéré, iii. §§ 1396-1495—Mérignhac, ii. pp. 249-294—Fiore, ii. Nos. 1145-1163—Calvo, iii. §§ 1499-1531—Martens, ii. §§ 12-14—Gottschalck, *Die Extritorialität der Gesandten* (1878)—Heyking, *L'Exterritorialité* (1889)—Odier, *Des Privilèges et Immunités des Agents diplomatiques* (1890)—Vercamer, *Des Franchises diplomatiques et spécialement de l'Exterritorialité* (1891)—Droin, *L'Exterritorialité des Agents diplomatiques* (1895)—Mirre, *Die Stellung der völkerrechtlichen Literatur zur Lehre von den sogenannten Nebenrechten der gesandtschaftlichen Funktionäre* (1904)—Ozanam, *L'Immunité civile de Jurisdiction des Agents diplomatiques* (1912)—Praag, Nos. 49-68, 163, and 203-226—Satow, *Diplomatic Practice*, i. §§ 312-347.

§ 389. The extritoriality which must be granted to diplomatic envoys by the Municipal Laws of all the

¹ Details regarding these cases are given by Phillimore, ii. §§ 166 and 170.

² See Article 6 of the rules regard-

ing diplomatic immunities adopted by the Institute of International Law at its meeting at Cambridge in 1895 (*Annuaire*, xiv. p. 241).

Reason
and Fic-
tional
Character
of Exter-
ritorial-
ity.

members of the Family of Nations is not, as in the case of sovereign heads of States, based on the principle *par in parem non habet imperium*, but on the necessity that envoys must, for the purpose of fulfilling their duties, be independent of the jurisdiction, the control, and the like, of the receiving States. Exterritoriality, in this as in every other case, is a fiction¹ only, for diplomatic envoys are in reality not without, but within, the territories of the receiving States. The term 'Exterritoriality' is nevertheless valuable, because it demonstrates clearly the fact that envoys must, in most respects, be treated as though they were not within the territory of the receiving States.² The so-called exterritoriality of envoys takes practical form in a body of privileges which must be severally discussed.

Immunity
of Domi-
cile.

§ 390. The first of these privileges is immunity of domicile, the so-called *Franchise de l'hôtel*. The present immunity of domicile has developed from the former condition of things, when the official residences of envoys were in every respect considered to be outside the territory of the receiving States, and when this exterritoriality was, in many cases, even extended to the whole quarter of the town in which such a residence was situated. One used then to speak of the *Franchise du quartier* or the *Jus quarteriorum*. And an inference from this *Franchise du quartier* was the so-called right of asylum, envoys claiming the right to grant asylum, within the boundaries of their residential quarters, to every individual who took refuge there.³ But already

¹ See Praag, Nos. 49-54.

² With a few exceptions (see Droin, *L'Exterritorialité des Agents diplomatiques* (1895), pp. 32-43), all publicists accept the term and the fiction of exterritoriality.

³ Although this right of asylum was certainly recognised by the

States in former centuries, it is of interest to note that Grotius did not consider it postulated by International Law, for he says of this right (ii. c. 18, § 8): 'Ex concessione pendet ejus apud quem agit. Istud enim juris gentium non est.' See also Bynkershoek, *De Foro Legatorum*, c. 21.

in the seventeenth century most States opposed this *Franchise du quartier*, and it totally disappeared in the eighteenth century, leaving behind, however, the claim of envoys to grant asylum within their official residences. Thus, when in 1726 the Duke of Ripperda, first minister to Philip v. of Spain, who was accused of high treason and had taken refuge in the residence of the English ambassador in Madrid, was forcibly arrested there by order of the Spanish Government, the British Government complained of this act as a violation of International Law.¹ Twenty-one years later, in 1747, a similar case occurred in Sweden. A merchant named Springer was accused of high treason, and took refuge in the house of the English ambassador at Stockholm. On the refusal of the English envoy to surrender Springer, the Swedish Government surrounded the embassy with troops, and ordered the carriage of the envoy, when leaving the embassy, to be followed by mounted soldiers. At last Springer was handed over to the Swedish Government under protest, but England complained and recalled her ambassador, as Sweden refused to make the required reparation.² As these two examples show, the right of asylum, although claimed and often conceded, was nevertheless not universally recognised. During the nineteenth century all remains of it vanished, and when in 1867 the French envoy in Lima claimed it, the Peruvian Government refused to concede it.³

¹ See Martens, *Causes célèbres*, i. p. 178.

² See Martens, *Causes célèbres*, ii. p. 52.

³ The South American States, Peru excepted, still grant to foreign envoys the right to afford asylum to political refugees in time of revolution. It is, however, acknowledged that this right is not based upon a rule of International Law, but merely upon local usage. See Hall, § 52;

Westlake, i. p. 282; Moore, ii. §§ 291-304; Gilbert in *A.J.*, iii. (1909), pp. 562-595; Robin in *R.G.*, xv. (1908), pp. 461-508; Scelle in *R.G.*, xix. (1912), pp. 623-634; Moore, *Asylum in Legations and Consulates, and in Vessels* (1892) (a reprint from the *Political Science Quarterly*, vol. vii.); Tobar y Borgono, *L'Asile interne devant le Droit international* (1912). That in practice in times of revolution and of persecution of

Nowadays the official residences of envoys are, *in a sense and in some respects only*, considered as though they were outside the territory of the receiving States. For the immunity of domicile granted to diplomatic envoys comprises the inaccessibility of these residences to officers of justice, police, or revenue, and the like, of the receiving States without the special consent of the respective envoys.¹ Therefore, no act of jurisdiction or administration of the receiving Governments can take place within these residences, except by special permission of the envoys. And the stables and carriages of envoys are considered to be parts of their residences. But such immunity of domicile is granted only in so far as it is necessary for the independence and inviolability of envoys, and the inviolability of their official documents and archives. If an envoy abuses this immunity, the receiving Government need not bear it passively. There is, therefore, no obligation on the part of the receiving State to grant an envoy the right of affording asylum to criminals, or to other individuals not belonging to his suite. Of course, an envoy need not deny entrance to criminals who want to take refuge in the embassy. But he must surrender them to the prosecuting Government at its request, and if he refuses, any measures may be taken to induce him to do so, apart from such as would involve an attack on his person. Thus, the embassy may be surrounded by soldiers, and

certain classes of the population asylum is occasionally granted to refugees, and respected by the local authorities, there is no doubt; but this occasional practice does not shake the validity of the general rule of International Law, according to which there is no obligation on the part of the receiving State to grant to envoys the right of affording asylum to individuals not belonging to their suites. See, however, Moore, ii. § 293.

¹ Can the official residence of an

envoy, if the property of his home State, be confiscated after his departure by the State on the territory of which it is situated as a measure of reprisals? During the World War, on August 25, 1916, the Italian Government confiscated the Palais de Venice in Rome, which was the seat of the Austrian Legation at the Holy See, as a measure of reprisals against the bombardment of Venice by Austrian aircraft. See Scelle in *R.G.*, xxiv. (1917), pp. 244-255, and below, vol. ii. § 247.

eventually the criminal may even forcibly be taken out of the embassy. But such measures of force are justifiable only if the case is an urgent one, and after the envoy has in vain been required to surrender the criminal. Further, if a crime is committed inside the house of an envoy by an individual who does not enjoy personally the privilege of extrterritoriality, the criminal must be surrendered to the local Government. The case of Nikitschenkow, which occurred in Paris in 1867, is an instance thereof. Nikitschenkow, a Russian subject not belonging to the Russian legation, made an attempt on, and wounded, a member of that legation within the precincts of the embassy. The French police were called in, and arrested the criminal. The Russian Government required his extradition, maintaining that, as the crime was committed inside the Russian embassy, it fell exclusively under Russian jurisdiction; but the French Government refused extradition, and Russia dropped her claim.

Again, an envoy has no right to seize a subject of his home State who is within the boundaries of the receiving State, and keep him under arrest inside the embassy with the intention of bringing him away into the power of his home State. An instance thereof is the case of the Chinaman, Sun Yat Sen, which occurred in London in 1896. He was a political refugee from China, living in London, and was induced to enter the house of the Chinese legation and kept under arrest there in order to be conveyed forcibly to China. The Chinese envoy contended that, as the house of the legation was Chinese territory, the English Government had no right to interfere. But the latter did interfere, and Sun Yat Sen was released after several days.

In contrast to this case may be mentioned that of Kalkstein which occurred on the Continent in 1670. Colonel von Kalkstein, a Prussian subject, had fled to

Poland for political reasons, since he was accused of high treason against the Prussian Government. Now Frederic William, the great Elector of Brandenburg, ordered his diplomatic envoy at Warsaw, the capital of Poland, to obtain possession of the person of Kalkstein. On November 28, 1670, this order was carried out. Kalkstein was secretly seized, and, wrapped up in a carpet, was carried across the frontier. He was afterwards executed at Memel.

Exemption from Criminal and Civil Jurisdiction.

§ 391. The second privilege of envoys in reference to their extraterritoriality is their exemption from criminal and civil jurisdiction. As their exemption from criminal jurisdiction is also a consequence of their inviolability, it has already been discussed,¹ and we have here only to deal with their exemption from civil² jurisdiction. No civil action of any kind as regards debts and the like can be brought against them in the civil courts of the receiving States. They cannot be arrested for debts, nor can their furniture, their carriages, their horses, and the like, be seized for debts. They cannot be prevented from leaving the country for not having paid their debts, nor can their passports be refused to them on this account. Thus, when in 1772 the French Government refused passports to Baron de Wrech, the envoy of the Landgrave of Hesse-Cassel at Paris, for not having paid his debts, all the other envoys in Paris complained of this act of the French Government as a violation of International Law.³ But the rule that an envoy is exempt from civil jurisdiction has certain exceptions. If an envoy enters an appearance to an action against himself, or if he himself brings an action under the jurisdiction of the receiving State, the courts of the latter in such cases have civil juris-

¹ See above, §§ 387-388.

² See Ozanam, *op. cit.*, pp. 110-188.

³ See Martens, *Causes célèbres*, ii. p. 282.

diction over him. And the same is valid as regards real property held within the boundaries of the receiving State by an envoy, not in his official character, but as a private individual, and as regards mercantile¹ ventures in which he might engage on the territory of the receiving State. But although in these cases the local courts may exercise jurisdiction over him, their judgments cannot be enforced if he refuses to comply with them, because no force can be applied against an envoy.²

§ 392. The third privilege of envoys in reference to their extritoriality is exemption from subpoena as witnesses. No envoy can be obliged, or even required, to appear as a witness in a civil or criminal or administrative court, nor is an envoy obliged to give evidence before a commissioner sent to his house. A remarkable case of this kind is that of the Dutch envoy, Dubois, in Washington, which happened in 1856. A case of homicide occurred in the presence of M. Dubois, and as his evidence was absolutely necessary for the trial, the Foreign Secretary of the United States asked Dubois to appear before the court as a witness, recognising the fact that Dubois had no duty to do so. When Dubois, on the advice of all the other diplomatic envoys in Washington, refused to comply with this desire, the United States brought the matter before the Dutch Government. The latter approved of Dubois' refusal, but authorised him to give evidence under oath before the American Foreign Secretary. As, however, such evidence would have had no value at all according to the

Exemption from Subpoena as Witnesses.

¹ The statute of 7 Anne, c. 12, on which the exemption of diplomatic envoys from English jurisdiction is based, does not exclude such envoy as embarks on mercantile ventures from the benefit of the Act, and the practice of the English courts grants, therefore, to foreign envoys even in such cases exemption from

local jurisdiction; see the case of *Magdalena Steam Navigation Co. v. Martin*, (1859) 2 E. and E. 94, overruling the case of *Taylor v. Best*, (1854) 14 C.B. 487. See also *Westlake*, i. 277, and *Praag*, Nos. 85-87.

² See *In re Francisco Suarez*, *Suarez v. Suarez*, [1917] 2 Ch. 131; [1918] 1 Ch. 176.

local law, Dubois' evidence was not taken, and the Government of the United States asked the Dutch Government to recall him.¹

Although an envoy cannot be compelled to give evidence, if he chooses for himself to appear as a witness, the courts can make use of his evidence. Thus in 1881, at the trial of Guiteau for the murder of President Garfield, the Venezuelan envoy, Señor Comancho, who was present when the crime was committed, appeared as a witness for the prosecution, the Venezuelan Government having authorised him to do so.²

Exemption from Police.

§ 393. The fourth privilege of envoys in reference to their extritoriality is exemption from the police of the receiving States. Orders and regulations of the police do not in any way bind them. On the other hand, this exemption from police does not carry with it any privilege for an envoy to do what he likes as regards matters which are regulated by the police. Although such regulations can in no way bind him, an envoy enjoys the privilege of exemption from police under the presupposition that he acts and behaves in such a manner as harmonises with the internal order of the receiving State. He is, therefore, expected to comply voluntarily with all such commands and injunctions of the local police as, on the one hand, do not restrict him in the effective exercise of his duties, and, on the other hand, are of importance for the general order and safety of the community. Of course, he cannot be punished if he acts otherwise, but the receiving Government may request his recall, or even be justified in taking other measures of such a kind as do not injure his inviolability. Thus, for instance, if, in time of plague, an envoy were not voluntarily to comply with important sanitary arrangements made by the local police, and if there were

¹ See Wharton, i. § 98; Moore, iv. § 662; and Calvo, iii. § 1520.

² See Moore, iv. § 662.

great danger in delay, a case of necessity would be created, and the receiving Government would be justified in the exercise of reasonable pressure upon the envoy.

§ 394. The fifth privilege of envoys in reference to their extritoriality is exemption from taxes and the like. As an envoy, through his extritoriality, is considered not to be subject to the territorial supremacy of the receiving State, he must be exempt from all direct personal taxation, and, therefore, need not pay either income-tax or other direct taxes. As regards rates, it is necessary to draw a distinction. Payment of rates imposed for local objects from which an envoy himself derives benefit, such as sewerage, lighting, water, night-watch, and the like, can be required of the envoy, although often ¹ this is not done. Other rates, however, such as poor-rates and the like, he cannot be requested to pay. As regards customs duties, International Law does not claim the exemption of envoys therefrom. In practice, and by courtesy, however, the Municipal Laws of many States allow diplomatic envoys, within certain limits, to receive free of duty goods intended for their own private use. If the house of an envoy is the property of his home State, or his own property, the house need not be exempt from property tax, although it is often so by the courtesy of the receiving State. Such property tax is not a personal and direct, but an indirect tax.

Exemption from Taxes and the like.

§ 395. A sixth privilege of envoys in reference to their extritoriality is the so-called Right of Chapel (*droit de chapelle* or *droit du culte*). This is the privilege of having a private chapel for the practice of his own religion, which must be granted to an envoy by the Municipal Law of the receiving State. A privilege

Right of Chapel.

¹ As, for instance, in England where the payment of local rates cannot be enforced by suit or distress against a member of a legation; see

Parkinson v. Potter, (1885) 16 Q.B.D. 152, and *Macartney v. Garbutt*, (1890) 24 Q.B.D. 368. See also Westlake, i. p. 278.

of great worth in former times, when freedom of religious worship was unknown in most States, it has at present a historical value only. But it has not disappeared, and might become again of practical importance in case a State should in the future give way to reactionary intolerance. It must, however, be emphasised that the right of chapel need only comprise the privilege of religious worship in a private chapel inside the official residence of the envoy. No right of having and tolling bells need be granted. The privilege includes the office of a chaplain, who must be allowed to perform every religious ceremony within the chapel, such as baptism and the like. It further includes permission to all the compatriots of the envoy, even if they do not belong to his retinue, to take part in the service. But the receiving State need not allow its own subjects to take part therein.

Self-jurisdiction.

§ 396. The seventh and last privilege of envoys in reference to their extritoriality is self-jurisdiction within certain limits. As the members of an envoy's retinue are considered extritorial, the receiving State has no jurisdiction over them, and the home State may therefore delegate civil and criminal jurisdiction to the envoy. But no receiving State is required to grant self-jurisdiction to an ambassador beyond a certain reasonable limit. Thus, an envoy must have jurisdiction over his retinue in matters of discipline, he must be able to order the arrest of a member of his retinue who has committed a crime and is to be sent home for his trial, and the like. But no civilised State would nowadays allow an envoy himself to try a member of his retinue. This was done in former centuries, as the following case proves: The Duc de Sully, then Marquis de Rosny, was sent in 1603 by Henri iv. of France on a special mission to England, as a ceremonial envoy to congratulate James I. upon his accession to the throne.

On the very day of his arrival, some members of his retinue fell into a brawl with some Englishmen, and one of the latter was killed. Sully had the murderer seized, and called together a jury of some Frenchmen who had accompanied him to London. This jury condemned the culprit to death for murder, and he was handed over to the Mayor of London to be executed. However, the Count of Beaumont-Harley, the permanent French ambassador in London, obtained from James I. a pardon for the convicted man.¹

X

POSITION OF DIPLOMATIC ENVOYS AS REGARDS
THIRD STATES

Grotius, ii. c. 18, § 5—Vattel, iv. §§ 84-86—Hall, §§ 99-101—Phillimore, ii. §§ 172-175—Taylor, §§ 293-295—Moore, iv. §§ 643-644—Twiss, i. § 222—Hershey, No. 272—Wheaton, §§ 244-247—Ullmann, § 52—Geffcken in *Holtzendorff*, iii. pp. 665-668—Heffter, § 207—Rivier, i. § 39—Nys, ii. p. 445—Pradier-Fodéré, iii. § 1394—Fiore, ii. Nos. 1143-1144—Calvo, iii. §§ 1532-1539—Praag, No. 227—Satow, *Diplomatic Practice*, i. §§ 348-367.

§ 397. Although, when an individual is accredited as diplomatic envoy by one State to another, these two States alone are directly concerned in his appointment, yet the position of an envoy must be considered in those cases in which he comes in contact with third States. Several such cases are possible. An envoy may travel through the territory of a third State to reach the territory of the receiving State. Or again, an envoy accredited to a belligerent State and living on the territory of the latter may be found there by the other belligerent who militarily occupies such territory.

Possible Cases.

¹ See Martens, *Causes célèbres*, i. p. 331. See also the two cases reported by Calvo, iii. § 1545.

Thirdly, an envoy accredited to a certain State might interfere with the affairs of a third State.

Envoy
travelling
through
Territory
of Third
State.

§ 398. If an envoy travels through the territory of a third State *incognito* or for his pleasure only, there is no doubt that he cannot claim any special privilege whatever. He is in exactly the same position as any other foreign individual travelling there, although by courtesy he might be treated with particular attention. But matters are different when an envoy, on his way from his own State to the State of his destination, travels through the territory of a third State. If the sending and the receiving States are not neighbours, the envoy probably has to travel through the territory of a third State. Now, as the institution of legation is necessary for the intercourse of States, and is firmly established by International Law, there ought to be no doubt that such third State must grant the right of innocent passage (*jus transitus innoxii*) to the envoy, provided that it is not at war with the sending or the receiving State. But other privileges,¹ especially those of inviolability and extritoriality, need not be granted to the envoy. Moreover, the right of innocent passage does not include the right to stop on the territory longer than is necessary for the passage. Thus, in 1854, Soulé, the envoy of the United States of America at Madrid, who had landed at Calais, intending to return to Madrid *via* Paris, was provisionally stopped at Calais for the purpose of ascertaining whether he intended to make a stay in Paris which the French Government wanted to prevent because he was a French refugee naturalised in America and was reported to have made speeches against the Emperor Napoleon. Soulé at once left Calais, and the French Government declared, during the correspondence

¹ The matter, which has always been disputed, is fully discussed by Twiss, i. § 222, who also quotes the

opinion of Grotius, Bynkershoek and Vattel.

with the United States in the matter, that there was no objection to Soulé traversing France on his way to Madrid, but that they would not allow him to make a sojourn in Paris, or anywhere else in France.¹

But no right of passage need be granted if the third State is at war with the sending or receiving State. The envoy of a belligerent, who travels through the territory of the other belligerent to reach the place of his destination, may be seized and treated as a prisoner of war. Thus, in 1744, when the French ambassador, Maréchal de Belle-Isle, on his way to Berlin, passed through the territory of Hanover, which country was then, together with England, at war with France, he was made a prisoner of war and sent to England. Again, in August 1917, after Cuba had entered the World War as an Allied Power, Herr von Heinrichs, formerly secretary to the German embassy at Madrid, was arrested and made a prisoner of war when landing at Havana from a Spanish steamer on which he was proceeding to Mexico, where he was being transferred. On the other hand, the envoy of a belligerent who travels to his neutral destination on a neutral vessel may not be forcibly removed and made a prisoner of war while the vessel is on the open sea.² But should the vessel enter the territorial waters, or a port, of the other belligerent, that envoy could be seized. Therefore when, in November 1914, during the World War, Count Tarnowski, the Austrian envoy to the United States, then neutral, intended to travel from Rotterdam to America, it was necessary to ask Great Britain for a safe-conduct. Otherwise he could have been made a prisoner of war when the vessel on which he was travelling entered British

¹ See Wharton, i. § 97, and Moore, iv. § 643. See also Wheaton, § 247. American practice would seem to grant inviolability and extraterritoriality in such cases. See *Wilson v.*

Blanco, (1889) 56 N. Y. Super. Ct. 582, and in Scott, *Cases on International Law*, p. 206.

² See *The Trent* case below, vol. ii. § 408 n.

territorial waters.¹ The same procedure was necessary, for the same reason, when in 1915 the Austrian ambassador at Washington, Dr. Dumba, and in 1917 the German ambassador at Washington, Count Bernsdorff, desired to return to their home States.

Envoy
found by
Bellige-
rent on
Occupied
Enemy
Territory.

§ 399. When in time of war a belligerent occupies the capital of an enemy State and finds there envoys of other States, these envoys do not lose their diplomatic privileges as long as the State to which they are accredited is in existence. As military occupation does not extinguish a State subjected thereto, such envoys do not cease to be envoys. On the other hand, they are not accredited to the belligerent who has taken possession of the territory by military force, and the question is not yet settled in International Law how far the occupying belligerent has to respect the inviolability and extritoriality granted to such envoys by the law of the land in compliance with a demand of International Law. It may safely be maintained that he must grant them the right to leave the occupied territory. But must he likewise grant them the right to stay? Has he to respect their immunity of domicile and their other privileges in reference to their extritoriality? Neither customary rules nor international conventions exist as regards these questions, which must, therefore, be treated as open. A case arose during the siege of Paris in 1870 by the Germans. Mr. Washburne, United States ambassador in Paris, claimed the right of sending a messenger with despatches to London in a sealed bag through the German lines. But the Germans refused to grant that right, and did not

¹ Similarly a member of the suite of an envoy may be made a prisoner of war if apprehended in a third State which is at war with his home State. Therefore, when in February 1918, during the World War, Captain von Krohn, the so-called

naval attaché to the German legation at Madrid, desired to return to Germany by crossing France, he had to possess a safe-conduct from the French Government. On the case of *von Papen*, see below, vol. ii. § 218.

alter their decision although the Government of the United States protested.¹

§ 400. There is no doubt that an envoy must not interfere in matters with regard to which the State to which he is accredited is involved with a third State. If he does interfere, he enjoys no privileges whatever against such third State. Thus, in 1734, the Marquis de Monti, the French envoy in Poland, who took an active part in the war between Poland and Russia, was made a prisoner of war by the Russians, and was not released till 1736, although France protested.²

Envoy interfering with Affairs of a Third State.

XI

THE RETINUE OF DIPLOMATIC ENVOYS

Grotius, ii. c. 18, § 8—Vattel, iv. §§ 120-124—Hall, § 51—Phillimore, ii. §§ 186-193—Twiss, i. § 218—Moore, iv. §§ 664-665—Hershey, No. 279—Ullmann, §§ 47 and 51—Geffcken in *Holtzendorff*, iii. pp. 660-661—Heffter, § 221—Rivier, i. pp. 458-461—Nys, ii. pp. 440-444—Pradier-Fodéré, iii. §§ 1472-1486—Fiore, ii. Nos. 1164-1168—Calvo, iii. §§ 1348-1350—Martens, ii. § 16—Roederer, *De l'Application des Immunités de l'Ambassadeur au Personnel de l'Ambassade* (1904), pp. 22-84—Praag, Nos. 229-236—Satow, *Diplomatic Practice*, i. §§ 375-383.

§ 401. The individuals accompanying an envoy officially, or in his private service, or as members of his family, or as couriers, compose his retinue. The members of the retinue belong, therefore, to four different classes. All those individuals who are officially attached to an envoy are members of the legation, and are appointed by the home State of the envoy. To this first class belong the councillors, attachés, and secretaries of the legation; the chancellor of the legation and his assistants; the interpreters, and the like; the chaplain, the doctor, and the legal advisers, provided that they are appointed by the home State, and are sent specially

Different Classes of Members of Retinue.

¹ See below, vol. ii. § 157, and Wharton, i. § 97.

² See Martens, *Causes célèbres*, i. p. 207.

as members of the legation. A list of these members of a legation is handed by the envoy to the Secretary for Foreign Affairs of the receiving State, and is revised from time to time. The councillors and secretaries of a legation are personally presented to the Secretary for Foreign Affairs, and very often also to the head of the receiving State. The second class comprises all those individuals who are in the private service of the envoy, such as servants of all kinds, the private secretary of the envoy, the tutor and the governess of his children. The third class consists of the members of the family of the envoy—namely, his wife, children, and such of his other near relatives as live within his family, and under his roof. And, lastly, the fourth class consists of the so-called couriers. They are the bearers of despatches sent by the envoy to his home State, who on their way back also bear despatches from the home State to the envoy. Such couriers are attached to most legations to guarantee the safety and secrecy of the despatches.

Privileges
of Mem-
bers of
Legation.

§ 402. It is a universally recognised¹ rule of International Law that all members of a legation are as inviolable and extraterritorial as the envoy himself. They must, therefore, be granted by the receiving State exemption from criminal and civil jurisdiction, exemption from police,² subpoena as witnesses, and taxes. They

¹ Some authors, however, plead for an abrogation of this rule. See Martens, ii. § 16.

² A case of this kind occurred in 1904 in the United States. Mr. Gurney, Secretary to the British embassy at Washington, was fined by the police magistrate of Lee, in Massachusetts, for furiously driving a motor-car. But the judgment was afterwards annulled, and the fine remitted. Another case of interest occurred in London in May 1913. The body of a young man was recovered from the river Thames, and identified as that of Mogen Schested,

a secretary to the Danish legation. The inquest necessary in such cases, according to English law, could not be held, because the Danish legation claimed exemption for Schested as one of its members. The body was therefore conveyed to Copenhagen without further interference by the police. Again, when in February 1916 Roberto Centaro, the first secretary to the Italian embassy in London, committed suicide by shooting himself in a hotel, on the demand of the Italian ambassador, the coroner refrained from holding an inquest, and the police did not further interfere.

are considered, like the envoy himself, to retain their domicile within their home State. Children born to them during their stay within the receiving State are considered as born on the territory of the home State. And it must be emphasised that it is not within the envoy's power to waive these privileges belonging to members of a legation,¹ although the home State itself can waive them. Thus when, in 1909, Wilhelm Beckert, the chancellor of the German legation in Santiago de Chili, murdered the porter of this legation, a Chilian subject, and then set fire to the chancery in order to conceal his embezzlement of money belonging to the legation, the German Government consented to his being prosecuted in Chili; he was tried, found guilty, and executed at Santiago on July 5, 1910. On the other hand, when in 1915 Gottfried Ruh, a registrar of the Swiss legation in Berlin, embezzled monies entrusted to the legation, the Swiss Government asked the German Government to arrest and extradite him to Switzerland; he was tried at Berne in June 1916, and condemned to penal servitude.

§ 403. It is a customary rule of International Law that the receiving State must grant to all persons in the private service of the envoy, provided such persons are not subjects of the receiving State, exemption from civil and criminal jurisdiction.² But the envoy can disclaim these exemptions, and these persons cannot then claim exemption from police, immunity of domicile, and exemption from taxes. Thus, for instance, if such a private servant commits a crime outside the

Privileges
of Private
Servants.

¹ See *In re Republic of Bolivia Exploration Syndicate, Ltd.*, [1914] 1 Ch. 139, and *Baty* in the *Law Magazine and Review*, xxxix. p. 349.

² This rule seems to be everywhere recognised except in Great Britain. When, in 1827, a coachman of Mr. Gallatin, the American minister in

London, committed an assault outside the embassy, he was arrested in the stable of the embassy and charged before a local magistrate, and the British Foreign Office refused to recognise the exemption of the coachman from the local jurisdiction. See Wharton, i. § 94, and Hall, § 51.

residence of his employer, the police can arrest him; he must, however, be at once released if the envoy does not waive the exemption from criminal jurisdiction.

Privileges
of Family
of Envoy.

§ 404. Although the wife of the envoy, his children, and such of his near relatives as live within his family and under his roof belong to his retinue, there is a distinction to be made as regards their privileges. His wife must certainly be granted all his privileges in so far as they concern inviolability and extraterritoriality. As regards, however, his children and other relatives, no other general rule of International Law can safely be said to be generally recognised, than that they must be granted exemption from civil and criminal jurisdiction. But even this rule was formerly not generally recognised. Thus, when in 1653 Don Pantaleon Sà, the brother of the Portuguese ambassador in London and a member of his suite, killed an Englishman named Greenaway, he was arrested, tried in England, found guilty, and executed.¹ Nowadays the exemption from civil and criminal jurisdiction of such members of an envoy's family as live under his roof is always granted. Thus, when in 1906 Carlos Waddington,² the son of the Chilean envoy at Brussels, murdered the secretary of the Chilean legation, the Belgian authorities did not take any steps to arrest him. Two days afterwards, however, the Chilean envoy waived the privilege of the immunity of his son, and on March 2 the Chilean Government likewise agreed to the murderer being prosecuted in Belgium. The trial took place in July 1907, but Waddington was acquitted by the Belgian jury.

Privi-
leges of
Couriers
of Envoy.

§ 405. To ensure the safety and secrecy of the diplomatic despatches they bear, couriers³ must be granted exemption from civil and criminal jurisdiction, and

¹ The case is discussed by Phillimore, ii. § 169.

² See *R.G.*, xiv. (1907), pp. 159-165.

³ See the valuable information concerning couriers in *Embassies and Foreign Courts* (1855), pp. 178-199.

afforded special protection during the exercise of their office. It is therefore usual to provide them with special passports. It is particularly important to observe that they must have the right of innocent passage through *third* States, and that, according to general usage, those parts of their luggage which contain diplomatic despatches, and are sealed with the official seal, must not be opened and searched.¹

XII

TERMINATION OF DIPLOMATIC MISSION

Vattel, iv. §§ 125-126—Hall, § 98**—Phillimore, ii. §§ 237-242—Moore, iv. §§ 636, 639, 640, 666—Hershey, Nos. 267-269—Taylor, §§ 320-323—Wheaton, §§ 250-251—Ullmann, § 53—Heffter, §§ 223-226—Rivier, i. § 40—Nys, ii. p. 447-449—Bonfils, Nos. 730-732—Pradier-Fodéré, iii. §§ 1515-1535—Fiore, ii. Nos. 1169-1175—Calvo, iii. §§ 1363-1367—Martens, ii. § 17—Satow, *Diplomatic Practice*, i. §§ 410-438.

§ 406. A diplomatic mission may come to an end from eleven different causes—namely, accomplishment of the object for which the mission was sent; expiration of letters of credence given to an envoy for a specific time only; recall of the envoy by the sending State; his promotion to a higher class; the delivery of passports to him by the receiving State; request of the envoy for his passports; war between the sending and the receiving State; constitutional changes in the headship of the sending or receiving State; revolutionary change of government in the sending or receiving State; extinction of the sending or receiving State; and, lastly, death of the envoy. These events must be treated singly on account of their peculiarities. But the termination of diplomatic missions must not be con-

Termination in contradiction to Suspension.

¹ This usage was abused during the World War, when couriers in the service of the German legations

in Norway and Switzerland carried explosives concealed in their sealed luggage.

founded with their suspension. Whereas from the foregoing eleven causes a mission actually comes to an end, and new letters of credence are necessary, a suspension does not put an end to the mission, but creates an interval during which the envoy, although he remains in office, cannot exercise his office. Suspension may be the result of various causes, as, for instance, a revolution within the sending or receiving State. Whatever the cause may be, an envoy enjoys all his privileges during the duration of the suspension.

Accom-
plishment
of Object
of Mis-
sion.

§ 407. A mission comes to an end through the fulfilment of its objects in all cases of missions sent for special purposes, such as ceremonial functions like representations at weddings, funerals, and coronations ; or notification of changes in the headship of a State ; or representation of a State at conferences and congresses, and the like. Although the mission is terminated through the accomplishment of its object, the envoys enjoy all their privileges on their way home.

Expira-
tion of
Letter of
Credence.

§ 408. If a letter of credence of a limited duration is given to an envoy, his mission terminates at the expiration of the period. A temporary letter of credence may, for instance, be given to an individual for the purpose of representing a State diplomatically during the interval between the recall of an ambassador and the appointment of his successor.

Recall.

§ 409. The mission of an envoy, be he permanently or only temporarily appointed, terminates through his recall by the sending State. If this recall is not caused by unfriendly acts of the receiving State, but by other circumstances, the envoy receives a letter of recall from the head, or, in case he is only a *chargé d'affaires*, from the Foreign Secretary of his home State, and he ¹

¹ But sometimes his successor presents the letter recalling his predecessor to the head of the receiving State, or to the Foreign Secretary in the case of *chargés d'affaires*.

hands this letter to the head of the receiving State in a solemn audience, or in the case of a chargé d'affaires to the Foreign Secretary. In exchange for the letter of recall the envoy receives his passports and a so-called *Lettre de récréance*, a letter in which the head of the receiving State (or the Foreign Secretary) acknowledges the letter of recall. Although therewith his mission ends, he enjoys nevertheless all his privileges on his home journey.¹ A recall may be caused by the resignation of the envoy, by his transference to another post, and the like. It may, secondly, be caused by the outbreak of a conflict between the sending and the receiving State which leads to a rupture of diplomatic intercourse, and under these circumstances the sending State may order its envoy to ask for his passports and depart at once without handing in a letter of recall. And, thirdly, a recall may result from a request of the receiving State by reason of real or alleged misconduct of the envoy. Such request of recall may lead to a rupture of diplomatic intercourse, if the receiving State insists upon the recall, and the sending State does not recognise the act of its envoy as misconduct.

Examples of requests by a receiving State for the recall of diplomatic envoys occurred during the World War.² On September 8, 1915, the United States requested the Austro-Hungarian Government to recall its ambassador at Washington, Dr. Dumba, for proposing plans to instigate strikes in American munition factories, and for employing an American citizen with an American passport as a secret bearer of official despatches through the lines of the enemy of Austria-Hungary. On December 4, 1915, the United States requested Germany to recall Captain Boy-Ed, naval attaché, and Captain von

¹ See the interesting cases discussed by Moore, iv. § 666. See also *In re Suarez, Suarez v. Suarez*, [1917] 2 Ch. 131; [1918] 1 Ch. 176.

² Earlier cases of request of recall of envoys are reported by Taylor, § 322; Hall, § 98^{**}; Moore, iv. § 639; Hershey, No. 269.

Papen, military attaché, to the German embassy at Washington, on account of their 'connection with the illegal and questionable acts of certain persons within the United States.'¹

Promo-
tion to a
Higher
Class.

§ 410. When an envoy remains at his post, but is promoted to a higher class—for instance, when a chargé d'affaires is created a minister resident, or a minister plenipotentiary is created an ambassador—his original mission technically ends, and he therefore receives a new letter of credence.

Delivery
of Pass-
ports.

§ 411. A mission may terminate, further, through the delivery of his passports to an envoy by the receiving State. The reason for such dismissal of an envoy may be, either gross misconduct on his part, or a quarrel between the sending and the receiving State which leads to a rupture of diplomatic intercourse. Whenever such rupture takes place, diplomatic relations between the two States come to an end, and all diplomatic privileges cease when the envoy departs and crosses the frontier. If the archives of the legations are not removed, they must be put under seal by the departing envoy, and confided to the protection² of some other foreign legation.

Request
for Pass-
ports.

§ 412. Without being recalled, an envoy may, on his own account, ask for his passports and depart, in consequence of ill-treatment by the receiving State. This may, or may not, lead to a rupture of diplomatic intercourse.

Outbreak
of War.

§ 413. When war breaks out between the sending and the receiving State before their envoys accredited to each other are recalled, their mission nevertheless comes to an end. They receive their passports, but they must be granted their privileges³ on their way home.

¹ See *A.J.*, x. (1916), Special Supplement, pp. 361, 363.

² As regards the case of *Monta-*

gnini, see above, §§ 106 and 386.

³ See below, vol. ii. § 98.

§ 414. If the head of the sending or receiving State is a sovereign, his death or abdication terminates the missions sent and received by him, and all envoys remaining at their posts must receive new letters of credence. But if they receive new letters of credence, their place in order of seniority remains as before. Moreover, during the time between the termination of their mission and the arrival of new letters of credence they enjoy all the privileges of diplomatic envoys.

Constitutional
Changes.

As regards the effect of constitutional changes in the headship of republics on the missions sent or received, this general rule can be laid down: When, as in France or the United States of America, the President is considered to be the head of the republic, and it is he who sends and receives diplomatic envoys, a constitutional change in the headship through death, abdication or expiration of office must necessarily terminate the missions sent and received by the former head, and new letters of credence must be provided. But when, as in Switzerland, the Bundesrath, a body of individuals, is considered to be the head of the republic, the death or abdication of the President, or the expiration of his term of office, does not terminate the missions, and no new letters of credence are necessary.

§ 415. A revolutionary movement in the sending or receiving State which creates a new Government, changing, for example, a republic into a monarchy or a monarchy into a republic, or deposing a sovereign and enthroning another, terminates the missions. All envoys remaining at their posts must receive new letters of credence, but no change in seniority takes place if they do receive them. It happens that in cases of revolutionary changes of Government foreign States, for some time, neither send new letters of credence to their envoys nor recall them, watching the course of events in the meantime, and waiting for more proof of

Revolutionary
Changes
of Govern-
ment.

a real settlement. In such cases the envoys are, according to an international usage, granted all privileges of diplomatic envoys, although in strict law they have ceased to be such. In cases of recall subsequent to revolutionary changes, the protection of subjects of the recalling States remains in the hands of their consuls, since the consular office¹ does not come to an end through constitutional or revolutionary changes in the headship of a State.

Extinction of sending or receiving State.

§ 416. If the State sending or receiving a mission is extinguished by voluntary merger into another State, or through annexation in consequence of conquest, the mission terminates *ipso facto*. In case of annexation of the receiving State, there can be no doubt that, although the annexing State will not consider the envoys received by the annexed State as accredited to itself, it must grant those envoys the right to leave the territory of the annexed State unmolested, and to take their archives away with them. In case of annexation of the sending State, the question arises what becomes of the archives and official property belonging to the missions of the annexed State accredited to foreign States. This question is one on the so-called succession² of States. The annexing State acquires, *ipso facto*, by the annexation the property in those archives and other official property, such as the hotels, furniture, and the like. But as long as the annexation is not notified and recognised, the receiving States have no duty to interfere.

Death of Envoy.

§ 417. A mission ends, lastly, by the death of the envoy. As soon as an envoy is dead, his effects, and especially his papers, must be sealed. This is done by a member of the legation of the dead envoy, or, if there be no such members, by a member of another legation accredited to the same State. The local Government

¹ See below, § 438.

² See above, § 82.

must not interfere, unless at the special request of the home State of the deceased envoy.

Although the mission, and therefore the privileges of the envoy, come to an end by his death, the members of his family who resided under his roof, and the members of his suite, enjoy their privileges until they leave the country. But a certain time may be fixed for them to depart, and on its expiration they lose their privilege of extritoriality. It must be specially mentioned that the courts of the receiving State have no jurisdiction whatever over the goods and effects of the deceased envoy, and that no death duties can be demanded.

CHAPTER III

CONSULS

I

THE INSTITUTION OF CONSULS

Hall, § 105—Phillimore, ii. §§ 243-246—Halleck, i. p. 396—Taylor, §§ 325-326—Twiss, i. § 223—Ullmann, §§ 54-55—Bulmerincq in *Holtzendorff*, iii. pp. 687-695—Heffter, §§ 241-242—Rivier, i. § 41—Nys, ii. pp. 450-460—Calvo, iii. §§ 1368-1372—Bonfils, Nos. 733-742—Pradier-Fodéré, iv. §§ 2034-2043—Martens, ii. §§ 18-19—Fiore, ii. Nos. 1176-1178—Warden, *A Treatise on the Origin, Nature, etc., of the Consular Establishment* (1814)—Miltitz, *Manuel des Consuls*, 5 vols. (1837-1839)—Cussy, *Règlements consulaires des principaux États maritimes* (1851)—H. B. Oppenheim, *Handbuch der Consulate aller Länder* (1854)—Clereq et Vallat, *Guide pratique des Consuls* (5th ed. 1898)—Salles, *L'Institution des Consuls, son Origine*, etc. (1898)—Chester Lloyd Jones, *The Consular Service of the United States: Its History and Activities* (1906)—Stowell, *Le Consul* (1909), and *Consular Cases and Opinions*, etc. (1909)—Pillaut, *Manuel de Droit consulaire*, 2 vols. (1910 and 1912)—Contuzzi, *Trattato teorico-pratico di Diritto consolare e diplomatico*, 2 vols. (1910, 1911)—Jordan in *R.I.*, 2nd Ser. viii. (1906), pp. 479-507, and 717-750.

Develop-
ment of
the Insti-
tution of
Consuls.

§ 418. The roots of the institution of consuls go back to the second half of the Middle Ages. In the commercial towns of Italy, Spain, and France the merchants used to appoint by election one or more of their fellow-merchants as arbitrators in commercial disputes, who were called *Juges Consuls* or *Consuls Marchands*. When, between and after the Crusades, Italian, Spanish, and French merchants settled down in the Eastern countries, founding factories, they brought the institution of consuls with them, the merchants belonging to the same

nation electing their own consul. The competence of these consuls became, however, more and more enlarged through treaties, so-called 'Capitulations,' between the home States of the merchants and the Mohammedan monarchs on whose territories these merchants had settled down.¹ The competence of consuls came to comprise the whole civil and criminal jurisdiction over, and protection of, the privileges, the life, and the property of their countrymen. From the East the institution of consuls was transferred to the West. Thus, in the fifteenth century Italian consuls existed in the Netherlands and in London, English consuls in the Netherlands, Sweden, Norway, Denmark, and Italy (Pisa). These consuls in the West exercised, just as did those in the East, exclusive civil and criminal jurisdiction over the merchants of their nationality. But the position of the consuls in the West decayed in the beginning of the seventeenth century through the influence of the rising permanent legations on the one hand, and, on the other, from the fact that everywhere foreign merchants were brought under the civil and criminal jurisdiction of the State in which they resided. This change in their competence altered the position of consuls in the Christian States of the West altogether. Their functions now shrank into a general supervision of the commerce and navigation of their home States, and into a kind of protection of the commercial interests of their countrymen. Consequently, they did not receive much notice in the seventeenth and eighteenth centuries, and it was not until the nineteenth century that the general development of international commerce, navigation, and shipping again drew the attention of the Governments to the value and importance of the institution of consuls. It was now systematically developed. The position of the consuls, their functions, and their

¹ See Twiss, i. §§ 253-263.

privileges were the subject of stipulations, either in commercial treaties, or in special consular treaties,¹ and the several States enacted statutes regarding the duties of their consuls abroad, such as the Consular Act passed by England in 1825.²

General
Char-
acter of
Consuls.

§ 419. Nowadays consuls are agents of States residing abroad for purposes of various kinds, but mainly in the interests of the commerce and navigation of the appointing State. As they are not diplomatic representatives, they do not enjoy diplomatic privileges. Nor have they, ordinarily, anything to do with intercourse between their home State and the State in which they reside. But these rules have exceptions. Consuls of Christian Powers in certain non-Christian States have retained their former competence, and exercise full civil and criminal jurisdiction over their countrymen. And sometimes consuls are charged with the tasks which are regularly fulfilled by diplomatic representatives. Thus, in States under suzerainty, the Powers are frequently represented by consuls, who transact all the business otherwise transacted by diplomatic representatives, and who have, therefore, often the title of 'Diplomatic Agents.' Thus, too, on occasions small States, instead of accrediting diplomatic envoys to another State, send only a consul, who combines consular functions with those of a diplomatic envoy. It must, however, be emphasised that consuls thereby neither become diplomatic envoys, although they may have the title of 'Diplomatic Agents,' nor enjoy the privileges of diplomatic envoys if such privileges are not specially provided for by treaties between the home State and the State in which they reside. Different, however, is the case in which a consul is at the same time accredited as *chargé d'affaires*, and in which, there-

¹ Phillimore, ii. § 255, gives a list of such treaties.

² 6 Geo. iv. c. 87.

fore, he combines two different offices; for as chargé d'affaires he is a diplomatic envoy, and enjoys all the privileges of such an envoy, provided he has received a letter of credence.

II

CONSULAR ORGANISATION

Hall, *Foreign Powers and Jurisdiction*, § 13—Phillimore, ii. §§ 253-254—Halleck, i. p. 396—Taylor, § 328—Moore, v. § 696—Hershey, No. 284—Ullmann, § 57—Balmerineq in *Holtendorff*, iii. pp. 695-701—Rivier, i. § 41—Calvo, iii. §§ 1373-1376—Bonfils, Nos. 743-748—Pradier-Fodéré, iv. §§ 2050-2055—Mérignhac, ii. pp. 320-333—Martens, ii. § 20—Stowell, *Le Consul*, pp. 186-205—*General Instructions for His Majesty's Consular Officers* (1907).

§ 420. Consuls are of two kinds. They are either specially sent and paid for the administration of their consular office (*Consules missi*), or they are appointed from individuals, in most cases merchants, residing in the district for which they are to administer the consular office (*Consules electi*).¹ Consuls of the first kind who are the so-called professional consuls, and are always subjects of the sending State, have to devote their whole time to the consular office. Consuls of the second kind, who may or may not be subjects of the sending State, administer the consular office besides following their ordinary callings. Some States, such as France, appoint professional consuls only; most States, however, appoint consuls of both kinds, according to the importance of the consular districts. But there is a general tendency with most States to appoint professional consuls for important districts.

Different
Kinds of
Consuls.

No difference exists in the general position of the two

¹ To this distinction corresponds the British Consular Service the distinction between 'Consular Officers' and 'Trading Consular Officers.'

kinds of consuls according to International Law. But, naturally, a professional consul enjoys in practice a greater authority, and a more important social position, and consular treaties often stipulate special privileges for professional consuls.

Consular
Districts.

§ 421. As the functions of consuls are of a more or less local character, most States appoint several consuls on the territory of other larger States, confining the duties of each to certain districts of such territories, or even to a certain town or port only. Consular districts as a rule coincide with provinces of the State in which the consuls administer their offices. Consuls in each consular district are independent of each other, and conduct their correspondence directly with the Foreign Office of their home State, the agents-consular excepted, who correspond only with the consul who appoints them. The extent of the districts is agreed upon between the home State of the consul and the admitting State. Only the consul appointed for a particular district is entitled to exercise consular functions within its boundaries, and to him alone the local authorities have to grant the consular privileges, if any.

Different
Classes of
Consuls.

§ 422. Four classes of consuls are generally distinguished according to rank: consuls-general, consuls, vice-consuls, and agents-consular. Consuls-general are appointed either as the head of several consular districts, and have then several consuls subordinate to themselves, or as the head of one very large consular district. Consuls are usually appointed for smaller districts, and for towns or even ports only. Vice-consuls are assistants of consuls-general and consuls who themselves possess consular character and so can take the consul's place in regard to all his duties; they are, according to the Municipal Law of some States, appointed by the consul, subject to the approbation of his home State. Agents-consular are agents with con-

sular character, appointed, subject to the approbation of the home Government, by a consul-general or consul for the exercise of certain parts of the consular functions in certain towns or other places of the consular district. Agents-consular are not independent of the appointing consul, and do not correspond directly with the home State, since the appointing consul is responsible to his Government for them. The so-called proconsul is not a consul, but a *locum tenens* only during the temporary absence or illness of a consul; he possesses, therefore, consular character for such time only as he actually is the *locum tenens*.

The British Consular Service, which is being reorganised, consisted in 1919¹ of the following six ranks: (1) agents and consuls-general, commissioners and consuls-general; (2) consuls-general; (3) consuls; (4) vice-consuls; (5) consular agents; (6) proconsuls. In the British Consular Service proconsuls only exercise, as a rule, the notarial functions of a consular officer.

§ 423. Although consuls conduct their correspondence directly with their home Government, they are nevertheless subordinate to the diplomatic envoy of their home Government accredited to the State in which they administer their consular office. According to the Municipal Law of almost every State except the United States of America, the diplomatic envoy has full authority and control over them. He can give instructions and orders, which they have to execute. In doubtful cases they have to ask his advice and instructions. On the other hand, the diplomatic envoy has to protect the consuls in case they are injured by the local Government.

Consuls
subordi-
nate to
Diplo-
matic
Envoys.

¹ See *Foreign Office List*, 1919.

III

APPOINTMENT OF CONSULS

Hall, § 105—Phillimore, ii. § 250—Halleck, i. p. 398—Moore, v. §§ 697-700—Hershey, No. 285—Ullmann, § 58—Bulmerincq in *Holtzendorff*, iii. pp. 702-706—Rivier, i. § 41—Nys, ii. p. 457—Calvo, iii. §§ 1378-1384—Bonfils, Nos. 749-752—Pradier-Fodéré, iv. §§ 2056-2067—Fiore, ii. Nos. 1181-1182—Martens, ii. § 21—Stowell, *Le Consul*, pp. 207-216.

Qualifica-
tion of
Candi-
dates.

§ 424. International Law has no rules in regard to the qualifications of an individual whom a State can appoint consul. Many States, however, by their Municipal Law require certain qualifications in professional consuls. The question whether female consuls could be appointed cannot be answered in the negative; but, on the other hand, no State is obliged to grant them the *exequatur*, and many States would at present certainly refuse it.

No State
obliged to
admit
Consuls.

§ 425. According to International Law a State is not obliged to admit any consuls. But the commercial interests of all States are so powerful, that in practice every State must admit consuls of foreign Powers; for a State which refused would in its turn not be allowed to have its own consuls abroad. Commercial and consular treaties stipulate, as a rule, that the contracting States shall have the right to appoint consuls in all those parts of each other's country in which consuls of third States are already or may in future be admitted. Consequently a State cannot refuse admittance to a consul of one State for a certain district if it admits a consul of another State. But as long as a State has not admitted the consul of any State for any particular district, it can refuse to admit the consuls of all. Thus, for instance, Russia refused for a long time for political reasons to admit consuls in Warsaw, now capital of Poland.

§ 426. There is no doubt that it is within the competence of every full sovereign State to appoint consuls. As regards not-full sovereign States, everything depends upon the special case. As foreign States can appoint consuls in States under suzerainty, it cannot be doubted that, provided the contrary is not specially stipulated between the vassal and the suzerain State, and provided the vassal State is not one which has no position within the Family of Nations,¹ a vassal State is, in its turn, competent to appoint consuls in foreign States. In regard to member-States of a Federal State, it is the constitution of the Federal State which settles the question. Thus, according to the constitution of Germany, as it was before the World War, the Federal State was exclusively competent to appoint consuls, in contradistinction to diplomatic envoys who might be sent and received by every member-State of the German Empire.

What
Kind of
States can
appoint
Consuls.

§ 427. Consuls are appointed through a patent or commission, the so-called *Lettre de provision*, of the State whose consular office they are intended to administer. Vice-consuls are sometimes, and agents-consular are always, appointed by the consul, subject to the approval of the home State. Admittance of consuls takes place through the grant of the so-called *exequatur* by the head of the admitting State.² The diplomatic envoy of the appointing State hands the patent of the appointed consul to the Secretary for Foreign Affairs for communication to the head of the State, and the *exequatur* is given, either in a special document, or by means of the word *exequatur* written across the patent. But the *exequatur* can be refused for personal reasons. Thus, in 1869 England refused the *exequatur* to an Irish-

Mode of
Appoint-
ment and
of Admit-
tance.

¹ See above § 91.

² That, in case a consul is appointed for a State which is under the protectorate of another, it is

within the competence of the latter to grant or refuse the *exequatur*, has been pointed out above, § 92.

man named Haggerty, who was naturalised in the United States and appointed American consul for Glasgow. And the *exequatur* can be withdrawn for personal reasons at any moment. Thus, in 1834 France withdrew it from the Prussian consul at Bayonne for having helped in getting supplies of arms into Spain for the Carlists.

Appoint-
ment of
Consuls
includes
Recog-
nition.

§ 428. As the appointment of consuls takes place in the interests of commerce, industry, and navigation, and has merely local importance without political consequences, it is maintained¹ that a State does not indirectly recognise a newly created State merely by appointing a consul to a district in it. This opinion, however, does not agree with the facts of international life. Since no consul can exercise his functions before he has handed over his patent to the local State, and has received its *exequatur*, it is evident that thereby the appointing State enters into such formal intercourse with the admitting State as indirectly² involves recognition. But it is only if consuls are formally appointed and formally receive the *exequatur* on the part of the receiving State, that indirect recognition is involved. If, on the other hand, no formal³ appointment is made, and no formal *exequatur* is asked for and received, foreign individuals may, with the consent of the local State, in fact exercise the functions of consuls without recognition following therefrom. Such individuals are not really consuls, although the local State allows them, for political reasons, to exercise consular functions.

¹ Hall, §§ 26* and 105, and Moore, i. § 72.

² See above, § 72.

³ The case mentioned by Hall, § 26*, of Great Britain appointing, in 1823, consuls to the South American

republics, without gazetting the various consuls and—as must be presumed—without the individuals concerned asking formally for the *exequatur* of the various South American States, would seem to be a case of informal appointment.

IV

FUNCTIONS OF CONSULS

Hall, § 105—Phillimore, ii. §§ 257-260—Taylor, § 327—Halleck, i. pp. 408-412—Moore, v. §§ 717-731—Hershey, No. 286—Ullmann, § 61—Bulmerincq in *Holtzendorff*, iii. pp. 738-753—Rivier, i. § 42—Calvo, iii. §§ 1421-1429—Bonfils, Nos. 762-771—Pradier-Fodéré, iv. §§ 2069-2113—Fiore, ii. Nos. 1184-1186—Martens, ii. § 23—Stowell, *Le Consul*, pp. 15-136.

§ 429. Although consuls are appointed chiefly in the interests of commerce, industry, and navigation, they are also charged with various functions for other purposes. Custom, commercial and consular treaties, Municipal Laws, and Municipal Consular Instructions prescribe detailed rules in regard to these functions. They may be grouped under the heads of promotion of commerce and industry, supervision of navigation, protection, notarial functions.

On Consular Functions in general.

§ 430. As consuls are appointed in the interests of commerce and industry, they must be allowed by the receiving State to watch over the execution of the commercial treaties of their home State, to send reports to the latter in regard to everything which can influence the development of its commerce and industry, and to give information to merchants and manufacturers of the appointing State necessary for the protection of their commercial interests. Municipal Laws of the several States and their Consular Instructions comprise detailed rules on these consular functions, which are of the greatest importance. Consular reports and consular information to members of the commercial world have rendered and render valuable assistance to the development of the commerce and industry of their home States.

Promotion of Commerce and Industry.

§ 431. Another task of consuls consists in supervising

Super-
vision of
Navigation.

the navigation of the appointing State. A consul at a port must be allowed to keep his eye on all merchantmen sailing under the flag of his home State which enter the port, to control and legalise their ship's papers, to inspect them on their arrival and departure, and to settle disputes between the master and crew or the passengers. He assists sailors in distress, undertakes the sending home of shipwrecked crews and passengers, and attests averages. It is neither necessary, nor possible, to enumerate all the duties and powers of consuls in regard to supervision of navigation. It should, however, be added that consuls must, upon the request of the commander, assist in every possible way any public vessel of their home State which enters their port ; but they have no power of supervision over them.

Protec-
tion.

§ 432. In exercising the protection which they must be allowed by the receiving State to provide for subjects of the appointing State, consuls fulfil a very important task. For that purpose they keep a register, in which these subjects can have their names and addresses recorded. Consuls make out passports, and they have to render certain assistance and help to paupers and the sick, and to litigants before the courts. If a foreign subject is wronged by the local authorities, his consul has to give him advice and help, and has eventually to interfere on his behalf. If a foreigner dies, his consul may be approached for securing his property, and for rendering all kind of assistance and help to the family of the deceased.

As a rule, a consul exercises protective functions over subjects of the appointing State only ; but the latter may charge him with the protection of subjects of other States which have not nominated a consul for his district.

§ 433. Very important are the notarial and similar functions with which consuls are charged. They attest

and legalise signatures, examine witnesses and administer oaths for the purpose of procuring evidence for the courts and other authorities of the appointing State. They conclude or register marriages of the subjects of the State which they represent, take charge of their wills, legalise their adoptions, register their births and deaths. They provide authorised translations for local and for home authorities, and furnish attestations of many kinds. All consular functions of this kind are enumerated in detail by Municipal Laws and Consular Instructions. But it should be specially observed that whereas promotion of commerce, supervision of navigation, and protection are functions the exercise of which must, according to a customary rule of International Law, be permitted to consuls by receiving States, many of their notarial functions need not be, in the absence of treaty stipulations.

Notarial
Func-
tions.

V

POSITION AND PRIVILEGES OF CONSULS

Hall, § 105—Phillimore, ii. §§ 261-271—Halleck, i. pp. 399-408—Taylor, §§ 326-332, 333—Moore, v. §§ 702-716—Hershey, Nos. 287-289—Ullmann, §§ 60 and 62—Bulmerincq in *Holtzendorff*, iii. pp. 710-720—Rivier, i. § 42—Calvo, iii. §§ 1385-1420—Bonfils, Nos. 753-761—Pradier-Fodéré, iv. §§ 2114-2121—Fiore, ii. No. 1183—Martens, ii. § 22—Bodin, *Les Immunités consulaires* (1899)—Stowell, *Le Consul*, pp. 137-184—Ludwig, *Consular Treaty Rights* (1914)—Heyking in the *Journal of the Society of Comparative Legislation*, New Ser. xiii. (1913), pp. 574-581—Lederle in *Z.I.*, xxvii. (1918), pp. 154-176.

§ 434. Like diplomatic envoys, consuls are simply objects of International Law. Such rights as they have are granted to them by Municipal Laws, in compliance with rights enjoyed by the appointing States according to International Law.¹ As regards their position, it

Position.

¹ See above, § 384.

should nowadays be uncontested that consuls do not enjoy the position of diplomatic envoys, since no Christian State in practice grants to foreign consuls the privileges of diplomatic agents.¹ On the other hand, it would be incorrect to maintain that their position is in no way different from that of any other individual living within the consular district. Since they are appointed by foreign States, and have received the *exequatur*, they are publicly recognised by the admitting State as agents of the appointing State. Of course, consuls are not diplomatic representatives, for they do not represent the appointing States in the totality of their international relations, but for a limited number of tasks, and for local purposes only. Yet they bear a recognised public character, in contradistinction to mere private individuals, and, consequently, their position is different, even though legally they might not be entitled to claim special privileges of any kind. This is certainly the case with regard to professional consuls, who are officials of their home State, and are specially sent to the foreign State for the purpose of administering the consular office. But in regard to non-professional consuls it must likewise be maintained that the admitting State by granting the *exequatur* recognises their official position towards itself, and this demands at least a special protection² for their persons and residences. The official position of consuls, however, does not involve direct intercourse with the Government of the admitting State. Consuls are appointed for *local* purposes only, and they have, therefore, direct intercourse with the *local authorities* only. If they want

¹ *Viveash v. Becker*, (1814) 3 M. and S. 284.

² According to British and American practice, a consul of a neutral Power accredited to an enemy State who embarks upon mercantile ven-

tures, is not protected by his official position against seizure of his goods carried by enemy vessels, for by trading in the enemy country he acquires to a certain extent enemy character; see the case of *The Indian Chief* (3 C. Rob. 12).

to approach the Government itself, they can do so only through the diplomatic envoy, to whom they are subordinate.

§ 435. From the undoubted official position of consuls no universally recognised privileges of importance have as yet been evolved. Apart from the special protection due to consuls according to International Law, there is neither a custom nor a universal agreement between the Powers to grant them important privileges. Such privileges as consuls actually enjoy are granted to them either by courtesy or in compliance with special stipulations in a commercial or consular treaty between the sending and the admitting State. I doubt not that in time the Powers will agree upon a universal treaty in regard to the position and privileges of consuls.¹ Meanwhile, it is of interest to notice some of the more important stipulations to be found in the innumerable treaties between the several States in regard to consular privileges:

(1) A distinction is very often made between professional and non-professional consuls, more privileges being accorded to the former.

(2) Although consuls are not exempt from the local civil and criminal jurisdiction, criminal jurisdiction over professional consuls is often limited to crimes of a more serious character.

(3) In many treaties it is stipulated that consular archives shall be inviolable from search or seizure. Consuls are therefore obliged to keep their official documents and correspondence separate from their private papers.

(4) Inviolability of the consular buildings is also sometimes stipulated, so that no officer of the local

Consular
Privi-
leges.

¹ The Institute of International Law at its meeting at Venice in 1896 adopted a 'Règlement sur les

Immunités consulaires' comprising twenty-one articles. *Annuaire*, xv. p. 304.

police, courts, etc., can enter these buildings without special permission from the consul. But it is then the duty of consuls to surrender criminals who have taken refuge in these buildings.

(5) Professional consuls are often exempt from all kinds of rates and taxes, from the liability to have soldiers quartered in their houses, and from the duty of appearing in person as witnesses before the courts. In the latter case consuls have either to send in their evidence in writing, or their evidence may be taken by a commission on the premises of the consulate.

(6) Consuls of all kinds have the right to put up the arms of the appointing State over the door of the consular building, and to hoist the national flag.

VI

TERMINATION OF CONSULAR OFFICE

Hall, § 105—Moore, v. § 701—Hershey, No. 290—Ullmann, § 59—Bulmerinoq in *Holtzendorff*, iii. p. 708—Rivier, i. pp. 533-534—Calvo, iii. §§ 1382, 1383, 1450—Bonfils, No. 775—Fiore, ii. No. 1187—Martens, ii. § 21—Stowell, *Le Consul*, pp. 217-222.

Un-
doubted
Causes of
Termina-
tion.

§ 436. Death of the consul, withdrawal of the *exequatur*, recall or dismissal, and, lastly, war between the appointing and the admitting State, are universally recognised causes of the termination of the consular office. When a consul dies, or war breaks out, the consular archives must not be touched by the local authorities. They remain either under the care of an *employé* of the consulate, or under the charge of a consul of another State, until the successor of the deceased consul arrives, or peace is concluded.

Doubtful
Causes of
Termina-
tion.

§ 437. It is not certain in practice whether the office of a consul terminates when his district, through cession, annexation following conquest, or revolt, becomes the

property of another State. The question ought to be answered in the affirmative, because the *exequatur* given to him originates from a Government which no longer possesses the territory. In 1836, Belgium, which was then not yet recognised by Russia, declared that she would no longer treat the Russian consul, Aegi, at Antwerp as consul, because he was appointed before the revolt, and his *exequatur* was granted by the Government of the Netherlands. Although Belgium gave way in the end to the urgent remonstrances of Russia, her original attitude was legally correct.

When a consular district has been conquered but not annexed, that is to say when it is under military occupation, different considerations apply. In November 1914, during the World War, after having occupied the greater part of Belgium, the German Government declared that the *exequatur* granted before the war by the Belgian Government to consuls of neutral States in occupied consular districts had expired through the German occupation, and that the offices of the consuls concerned had terminated. The Belgian Government protested, but the United States of America rightly held that the occupying Government need not recognise an *exequatur* given by the legitimate Government, but might suspend it. However, suspension is not termination, and such an *exequatur* at once revives on the occupation coming to an end.

§ 438. It is universally recognised that, in contradistinction to a diplomatic mission, the consular office does not come to an end through a change in the headship of the appointing or the admitting State. Neither a new patent nor a new *exequatur* is therefore necessary whether another king comes to the throne or a monarchy turns into a republic, or in any like case.

Change in
the Head-
ship of
States not
Cause of
Termina-
tion.

VII

CONSULS IN NON-CHRISTIAN STATES

Halleck, i. pp. 386-400—Phillimore, ii. §§ 272-277—Taylor, §§ 331-333—Twiss, i. §§ 163, 253-264—Hershey, No. 291—Wheaton, § 110—Ullmann, §§ 63-65—Bulmerincq in *Holtzendorff*, iii. pp. 720-738—Rivier, i. § 43—Nys, ii. pp. 460-475—Calvo, iii. §§ 1431-1444—Bonfils, Nos. 776-791—Pradier-Fodéré, iv. 2122-2138—Mérignhac, ii. pp. 338-351—Martens, ii. §§ 24-26, and *Konsularwesen und Konsularjurisdiction im Orient* (German translation from the Russian original by Skerst, 1874)—Tarring, *British Consular Jurisdiction in the East* (1887)—Hall, *Foreign Powers and Jurisdiction*, §§ 64-85—Bruillat, *Étude historique et critique sur les Juridictions consulaires* (1898)—Lippmann, *Die Konsularjurisdiction im Orient* (1898)—Vergé, *Des Consuls dans les Pays d'Occident* (1903)—Hinckley, *American Consular Jurisdiction in the Orient* (1906)—Piggott, *Exterritoriality: The Law relating to Consular Jurisdiction, etc., in Oriental Countries* (new ed. 1907)—Mandelstam, *La Justice ottomane dans ses Rapports avec les Puissances étrangères* (1911), and in *R.G.*, xiv. (1907), pp. 5 and 534, and xv. (1908), pp. 329-384—Tchou, *Le Régime des Capitulations . . . en Chine* (1915).

Position
of Consuls
in certain
non-
Christian
States.

§ 439. Consuls in certain non-Christian States enjoy a position fundamentally different from that of consuls in general. In the Christian countries of the West consuls have, as has been stated (§ 418), lost jurisdiction over the subjects of the appointing States. In the Mohammedan States consuls not only retained their original jurisdiction, but by degrees acquired, through the so-called Capitulations, complete civil and criminal jurisdiction, the power of protection over the privileges, life, and property of their countrymen, and even the power to expel one of their countrymen for bad conduct. Moreover, custom and treaties secured to consuls in these States inviolability, extrterritoriality, ceremonial honours, and miscellaneous other rights, so that there is no doubt that their position became materially the same as that of diplomatic envoys. A similar position was acquired by consuls in China, Japan, Persia, and other non-Christian countries.

In 1899, however, consuls in Japan lost this privileged position and became assimilated to those in Western States. In 1914 Turkey denounced the Capitulations,¹ but by the Treaty of Peace will be called upon to accept a scheme of judicial reform drawn up by foreign Powers. By the Treaties of Peace with Germany and Austria these States renounced the benefits of treaties conferring upon them extraterritorial jurisdiction in Siam, and of the Capitulations in Morocco and Egypt. It appears therefore that consular jurisdiction in Eastern States is being gradually restricted within narrower limits.

§ 440. Where consular jurisdiction is still in full force, international custom and treaties only lay down the rule that all the subjects of Christian States shall remain under the jurisdiction of the home State as exercised by their consuls.¹ It is for the Municipal Laws of the States concerned to organise this consular jurisdiction, and all States have in fact done so. As regards Great Britain, the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37) and several Orders in Council are now its legal basis.² The working of consular jurisdiction is, however, not satisfactory in regard to the so-called 'mixed cases.' As the consul has *exclusive* jurisdiction over the subjects of his home State, he exercises it also in cases in which the plaintiff is a native, or is a subject of another State. These are called 'mixed cases.'

Consular
Jurisdiction in
certain
non-
Christian
States.

§ 441. To overcome some of the disadvantages of the consular jurisdiction, an interesting experiment was made in Egypt. On the initiative of the Khedive, most of the Powers in 1875 agreed to the organisation of international courts in Egypt for mixed cases,³

International
Courts in
Egypt.

¹ See above, § 318.

² See Piggott, *op. cit.*

³ See Holland, *The European Concert in the Eastern Question*, pp. 102-103; Scott, *The Law affecting Foreigners in Egypt as the Result*

of the Capitulations (1907); Goudy in the *Law Quarterly Review*, xxiii. (1907), pp. 409-419; Vercamer, *La Jurisdiction mixte égyptienne et ses Attributions législatives* (1911); Garcia de Herreros, *Les Tribunaux mixtes d'Egypte* (1915).

which began their work in 1876. They were chiefly given jurisdiction in mixed civil cases, mixed criminal cases of importance remaining under the jurisdiction of the national consuls. Three international courts of first instance were established, each composed of three natives and four foreigners, and one international court of appeal at Alexandria, composed of four natives and seven foreigners.

But Egypt has now become a British protectorate, and the Egyptian judicial system is in process of reorganisation. Great Britain will, where necessary, conduct negotiations with foreign States to secure their concurrence in the proposed changes. Germany and Austria have already surrendered their right to intervene in this matter.¹

Excep-
tional
Character
of Consuls
in certain
non-
Christian
States.

§ 442. There is no doubt that the exceptional position of consuls in States where consular jurisdiction is exercised does not agree with the principles of International Law otherwise universally recognised; but it is, and must remain, a necessity, so long as the civilisation of these States has not developed their ideas of justice in accordance with Christian ideas, so as to preserve the life, property, and honour of foreigners before native courts. The case of Japan is an example of the readiness of the Powers to consent to the withdrawal of consular jurisdiction in such States as soon as they have reached a certain level of civilisation.

¹ See Treaty of Peace with Germany, Articles 147-148; Treaty of

Peace with Austria, Articles 102-103.

CHAPTER IV

MISCELLANEOUS AGENCIES

I

ARMED FORCES ON FOREIGN TERRITORY

Hall, §§ 54, 56, 102—Lawrence, § 107—Phillimore, i. § 341—Taylor, § 131—Twiss, i. § 165—Wheaton, § 99—Moore, ii. § 251—Westlake, i. p. 265—Stoerk in *Holtzendorff*, ii. pp. 664-666—Rivier, i. pp. 333-335—Calvo, iii. § 1560—Fibre, i. Nos. 528-529—Praag, Nos. 245-250.

§ 443. Armed forces are organs of the State which maintains them, because they are created for the purpose of maintaining the independence, authority, and safety of the State. And in this respect it matters not whether armed forces are at home or abroad ; for they are organs of their home State, even when on foreign territory, provided only that they are there in the service of their State, and not for their own purposes. For if a body of armed soldiers enters foreign territory without orders from, or without being otherwise in the service of, its State, but on its own account, be it for pleasure or for the purpose of committing acts of violence, it is no longer an organ of its State.

Armed
Forces
State
Organs.

§ 444. Besides war, there are several occasions for armed forces to be on foreign territory in the service of their home State. Thus, a State may have a right to keep troops in a foreign fortress, or to send troops through foreign territory. Thus, further, a State which

Occasions
for Armed
Forces
Abroad.

has been victorious in war with another may, after the conclusion of peace, occupy a part of the territory of its former opponent as a guarantee for the execution of the treaty of peace. After the Franco-German War, for example, the Germans in 1871 occupied a part of the territory of France until the final instalments of the indemnity for the war costs of five milliards of francs were paid. Or again, under Articles 428 to 432 of the Treaty of Peace with Germany, the German territory west of the Rhine and the Rhine bridgeheads are to be occupied by Allied and Associated troops as a guarantee for the execution of the treaty. It may also be a case of necessity for the armed forces of a State to enter foreign territory and commit acts of violence there, as the British did in the case of *The Caroline*.¹

Position
of Armed
Forces
Abroad.

§ 445. Whenever armed forces are on foreign territory in the service of their home State, they are considered extraterritorial and remain, therefore, under its jurisdiction. A crime committed on foreign territory by a member of these forces cannot be punished by the local civil or military authorities, but only by the commanding officer of the forces or by other authorities of their home State.² This rule, however, applies only in case the crime is committed, either within the place where the force is stationed, or in some place where the criminal was on duty; it does not apply, if, for example, soldiers belonging to a foreign garrison of a fortress leave the *rayon* of the fortress, not on duty but for recreation and pleasure, and then and there commit a crime. The local authorities are in that case competent to punish them.

Nor does it apply if in time of war a belligerent cap-

¹ See above, § 133, and below, § 446.

² This is nowadays the opinion of the vast majority of writers on International Law. There are, however,

still a few dissenting authorities, such as Bar, *Lehrbuch des internationalen Privat- und Strafrechts* (1892), p. 351, and Rivier, i. p. 333.

tures members of the armed forces of the enemy who before their capture committed such violations of the laws and customs of war as are considered to be war crimes. A belligerent may try prisoners of war, and punish them, as war criminals.¹

§ 446. An excellent example of the position of armed forces abroad is furnished by the case of *M'Leod*,² which occurred in 1840. Alexander M'Leod, who was a member of the British force sent by the Canadian Government in 1837 into the territory of the United States for the purpose of capturing the *Caroline*, a boat equipped for crossing into Canadian territory, and taking help to the Canadian insurgents, came in 1840 on business to the State of New York, and was there arrested and indicted for the killing of one Amos Durfee, a citizen of the United States, on the occasion of the capture of the *Caroline*. The British ambassador at Washington demanded the release of M'Leod, on the ground that he was, at the time of the alleged crime, a member of a British armed force sent into the territory of the United States by the Canadian Government acting in a case of necessity. M'Leod was not released, but had to stand his trial in 1840, when he was acquitted on proof of an *alibi*. However, in the reply of Mr. Webster, the Secretary for Foreign Affairs of the United States, to a note from the British ambassador occurs the following passage: 'The Government of the United States enter-

Case of
M'Leod.

¹ See below, vol. ii. § 251. When, during the World War, the French tried by court-martial, and punished, German prisoners of war who had pillaged before their capture, some German writers—see Strupp in *Z.I.*, xxv. (1915), p. 359—asserted that since armed forces abroad remain under the exclusive jurisdiction of their home State, the French had no right to punish captured German soldiers for war crimes. But this

assertion is quite unfounded, since the very definition of war crimes as such acts of soldiers or other individuals *as may be punished by the enemy on capture of the offenders*—see below, vol. ii. § 251—involves the right of a belligerent to punish prisoners of war for having previously violated the laws and customs of war.

² See Wharton, i. § 21, and Moore, ii. § 179.

tains no doubt that, after the avowal of the transaction as a public transaction, authorised and undertaken by the British authorities, individuals concerned in it ought not . . . to be holden personally responsible in the ordinary tribunals for their participation in it.'

The Casa
Blanca
Incident.

§ 446*a*. Another interesting example is the Casa Blanca incident. On September 25, 1908, six soldiers—three of them Germans—belonging to the French Foreign Legion which formed part of the French troops in Morocco, deserted at Casa Blanca, and asked for, and obtained, the protection of the local German consul, who intended to take them on board a German vessel lying in the harbour of Casa Blanca. On their way to the ship, however, they were forcibly taken by the French out of the custody of the secretary of the German consulate, and of a native soldier in the service of the consulate, who were conducting them. Considering all Germans in Morocco without exception extraterritorial, and under the exclusive jurisdiction of her consul, Germany complained of this act of force, and demanded that those of the deserters who were German subjects should be given up to her by France. Germany admitted that the consul had no right to extend his protection to other than German subjects. France refused to concede this demand, maintaining that the individuals concerned had, even after their desertion, remained under the exclusive jurisdiction of their corps, which formed part of a French force occupying foreign territory. As the parties could not settle the conflict diplomatically, they agreed, on November 10, 1908, to bring it before the Hague Court of Arbitration, which gave its award¹ on May 22, 1909, which was on the whole in favour of France. The Court held that there was a conflict of jurisdiction with regard to the German deserters, because

¹ See Martens, *N.R.G.*, 3rd Ser. ii. p. 19. An English translation

of the award is printed in *A.J.*, iii. (1909), p. 755.

as German subjects they were under the exclusive jurisdiction of the German consulate, but as deserters from the French Foreign Legion they were under the exclusive jurisdiction of the French Army of Occupation; that, under the circumstances of the case, the jurisdiction of the Army of Occupation should have the preference; that nevertheless the German consul was not to be blamed for his action, since in a country granting extraterritorial jurisdiction to foreigners the question of the respective competency of the consular jurisdiction and of the jurisdiction of an Army of Occupation was very complicated and had never been settled in an express, distinct, and universally recognised manner; that, since the German deserters were found at the port under the actual protection of the German consulate, and this protection was not manifestly illegal, the actual situation should, as far as possible, have been respected by the French military authority; that therefore the French military authorities ought to have confined themselves to preventing the embarkation and escape of the deserters, and, before proceeding to their arrest and imprisonment, ought to have offered to leave them under sequestration by the German consulate until the question of the competent jurisdiction had been decided. The Court did not, however, decree the restitution by France of the three German deserters to Germany.¹

¹ The ambiguity of the award has justly been severely criticised. If, as the Court correctly asserts, the jurisdiction of an Army of Occupation must prevail over the jurisdiction of a consul over his nationals in a country granting extraterritorial jurisdiction, a decision of the conflict on mere legal grounds would have to be entirely in favour of France, for it is difficult to see how a wrongfully acquired and illegally asserted protection can create any obligation on the part of those who

are exclusively competent to exercise jurisdiction. But it is a well-known fact that courts of arbitration frequently endeavour to give an award which satisfies both parties, and the ambiguity of the award in the Casa Blanca incident is manifestly due to this cause. The award is not of such a kind as one would expect from a court of justice, although it may be an excellent specimen of an arbitral decision. See *A.J.*, iii. (1909), pp. 698-701.

II

MEN-OF-WAR IN FOREIGN WATERS

Hall, §§ 54-55—Lawrence, § 107—Phillimore, ii. §§ 344-350—Westlake, pp. 266-269—Taylor, § 261—Moore, ii. §§ 252-256—Twiss, i. § 165—Stephen, *History of the Criminal Law of England* (1883), ii. pp. 43-58—Wheaton, § 100—Bluntschli, § 321—Stoerk in *Holtzendorff*, ii. pp. 434-446—Perels, §§ 11, 14, 15—Heilborn, *System*, pp. 248-278—Rivier, i. pp. 333-335—Bonfils, Nos. 614-623—Mérignhac, ii. pp. 554-565—Calvo, iii. §§ 1550-1559—Fiore, i. Nos. 547-550—Testa, p. 86—Jordan, *R.I.*, 2nd Ser. x. (1908), p. 343—Praag, Nos. 251-259.

Men-of-war State Organs.

§ 447. Men-of-war are State organs just as armed forces are, a man-of-war being in fact a part of the armed forces of a State. And respecting their character as State organs, it matters not whether men-of-war are at home, or in foreign territorial waters, or on the high seas. But it must be emphasised that men-of-war are State organs only so long as they are manned, and under the command of a responsible officer, and, further, so long as they are in the service of a State. A shipwrecked man-of-war, abandoned by her crew, is no longer a State organ; nor does a man-of-war in revolt against her State, and sailing for her own purposes, retain her character as an organ of a State. On the other hand, public vessels in the service of the police and the customs of a State; private vessels chartered by a State for the transport of troops and war materials; and vessels carrying a head of a State and his suite exclusively, are also considered to be State organs, and are, consequently, in every point treated as though they were men-of-war.

Proof of Character as Men-of-war.

§ 448. The character of a man-of-war, or of any other vessel treated as a man-of-war, is, in the first instance, proved by its outward appearance; a vessel of this kind

flies the war flag and the pennant of its State.¹ If, nevertheless, the character of the vessel seems doubtful, her commission, duly signed by the authorities of the State which she appears to represent, supplies a complete proof of her character as a man-of-war. And it is by no means necessary to prove that the vessel is really the property of the State, the commission being sufficient evidence of her character. Vessels chartered by a State for the transport of troops, or for the purpose of carrying its head, are indeed not the property of such State, although they bear, by virtue of their commissions, the same character as men-of-war.²

§ 449. Whereas armed forces in time of peace have no occasion to be abroad except under some special condition, or in a case of necessity, men-of-war belonging to all maritime States possessing a navy are constantly crossing the high seas in all parts of the world, for all kinds of purposes ; and occasions for men-of-war to sail through foreign territorial waters, and to enter foreign ports, necessarily arise. No special convention between the flag-State and the littoral State is necessary to enable them to do this. All the territorial waters and ports of civilised States are, as a rule, open to men-of-war as well as to merchantmen of all nations, provided they are not excluded by special international stipulations, or special Municipal Laws of the littoral States. On the other hand, it must be emphasised that, unless special international stipulations, or special treaties between the flag-State and the littoral State, provide to the contrary in regard to a particular port or to certain territorial waters, a State is, in strict law, always competent to exclude men-of-war from all or certain of its ports,

Occasions
for Men-
of-war
Abroad.

¹ Attention ought to be drawn here to Convention VII. (concerning the conversion of merchant ships into warships) of the second Hague Peace Conference of 1907. Although this convention concerns the time of

war only, it is indirectly of importance for the time of peace. For its stipulations, see below, vol. ii. § 84.

² Privateers used to enjoy the same character and exemptions as men-of-war.

and from those territorial waters which do not serve as highways for international traffic.¹ And a State is, further, always competent to impose what conditions it thinks necessary upon men-of-war which it allows to enter its ports, provided these conditions do not deny to men-of-war their universally recognised privileges.

Position
of Men-of-
war in
Foreign
Waters.

§ 450. The position of men-of-war² in foreign waters is characterised by the fact that they are called 'floating' portions of the flag-State. For at the present time there is a customary rule of International Law, universally recognised, that the State owning the waters into which foreign men-of-war enter must treat them in every point as though they were floating portions of their flag-State.³ Consequently, a man-of-war, with all persons and goods on board, remains under the juris-

¹ The matter is controversial. See above, § 188, and Westlake, i. p. 196, in contradistinction to Hall, § 42.

² As to merchantmen, see above, § 189.

³ This rule became universally recognised during the nineteenth century only. On the change of doctrines formerly held in this country and the United States of America, see Hall, § 54, and Lawrence, § 107. English and American courts now recognise the extritoriality of foreign public vessels. Thus, in *The Exchange* (7 Cranch 116), the Supreme Court of the United States recognised that it had no jurisdiction over this French man-of-war. In *The Constitution*, an American man-of-war, the High Court of Admiralty in 1879 held that foreign public ships cannot be sued in English courts for salvage (4 P.D. 39). And in the case of *The Parlement Belge*, ((1880) 5 P.D. 197, 214), the Court of Appeal and the House of Lords held that foreign public vessels cannot be sued in English courts for damages for collision. The same was held in 1906 in *The Jassy*, a Roumanian ship (10 Asp. p. 278). See also *The Charkieh*, (1873) L.R. 4 A. and E.

59. In *The Gagara* ([1919] P. 95) it was held that a ship claimed as the property of a *de facto* government, only temporarily recognised, must be treated in the same way.

Different is the case of a private vessel which has been requisitioned or chartered by the Government. While a ship is in the service of the Government concerned she is indeed exempt from arrest for claims for salvage, collision, etc. But claimants are not thereby deprived of their rights of action, although they are precluded for the time being from exercising some of the rights ordinarily incident thereto. See *The Broadmayne*, [1916] P. 64; *The Messicano*, (1916) 32 T.L.R. 519; and *The Crimdon*, (1918) 35 T.L.R. 81. But the practice of the American courts seems to be different; see Nielsen in *A.J.*, xiii. (1919), pp. 12-21, and the case of *The Atualita* there quoted.

It must be specially mentioned that, in accordance with Article 281 of the Treaty of Peace with Germany, if the German Government engages in international trade, it is not to have in respect thereof any rights, privileges or immunities of sovereignty; similar provisions occur in other treaties of peace.

diction of her flag-State even during her stay in foreign waters. No official of the littoral State is allowed to board the vessel without special permission of the commander. Crimes committed on board by persons in the service of the vessel are under the exclusive jurisdiction of the commander and the other home authorities. Individuals who are subjects of the littoral State, and are only temporarily on board, may, although they need not, be taken to the home country of the vessel, to be punished there, if they commit a crime on board. Even individuals who do not belong to the crew, and who, after having committed a crime on the territory of the littoral State, have taken refuge on board, cannot be forcibly taken off the vessel; if the commander refuses their surrender, it can be obtained only by diplomatic means from the home State.¹

On the other hand, men-of-war cannot do what they like in foreign waters. They are expected voluntarily to comply with the laws of the littoral States with regard to order in the ports, the places for casting anchor, sanitation and quarantine, customs, and the like. A man-of-war which refuses to do so can be expelled, and, if on such or other occasions she commits acts of violence against the officials of the littoral State or against other vessels, steps may be taken against her to prevent further acts of violence. But it must be emphasised that, even by committing acts of violence, a man-of-war does not fall under the jurisdiction of the littoral State. Only such measures are allowed against her as are necessary to prevent her from further acts of violence.²

¹ On the question of asylum of foreign men-of-war generally, see Moore, *Asylum in Legations and Consulates and Vessels* (1892), a reprint from the *Political Science Quarterly*, vol. vii.

² Attention ought to be drawn to

the 'Règlement sur le Régime légal des Navires et de leurs Equipages dans les Ports étrangers,' adopted by the Institute of International Law, in 1898, at its meeting at the Hague, of which Articles 8-24 deal with men-of-war in foreign waters; *Annuaire*, xvii. (1898), pp. 275-280.

Position
of Crew
when on
Land
Abroad.

§ 451. Of some importance is the unsettled question respecting the position of the commander and the crew of a man-of-war in a foreign port when they are on land.

The majority of publicists distinguish between a stay on land in the service of the man-of-war and a stay for other purposes.¹ The commander and members of the crew ashore in an official capacity in the service of their vessel, to buy provisions, or to make other arrangements respecting the vessel, remain under the exclusive jurisdiction of their home State, even for crimes they commit on the spot. Although they may, if necessary, be arrested to prevent further violence, they must at once be surrendered to the vessel. On the other hand, if they are on land not on official business, but for purposes of pleasure and recreation, they are under the territorial supremacy of the littoral State like any other foreigners, and they may be punished for crimes committed ashore.

There are, however, a number of publicists² who do not make this distinction, and maintain that commanders, or members of the crew, whilst ashore, are in every case under the local jurisdiction.

III

AGENTS WITHOUT DIPLOMATIC OR CONSULAR CHARACTER

Hall, §§ 103-104*—Moore, iv. § 623—Bluntschli, §§ 241-243—Ullmann, §§ 66-67—Heffter, § 222—Rivier, i. § 44—Calvo, iii. §§ 1337-1339—Fiore, ii. Nos. 1188-1191—Martens, ii. § 5—Adler, *Die Spionage* (1906), pp. 63-92—Routier, *L'Espionage et la Trahison en Temps de Paix et en Temps de Guerre* (1915).

§ 452. Besides diplomatic envoys and consuls, States

¹ So also Moore, ii. § 256.

Phillimore, i. § 346; Testa, p. 109. See also Article 18 of the 'Règlement' referred to on p. 615, n. 2.

² See, for instance, Hall, § 55;

may, and do, send various kinds of agents abroad—namely, public political agents, secret political agents, spies, commissaries, and bearers of despatches. The position of these agents varies according to the class to which they belong.

Agents lacking Diplomatic or Consular Character.

§ 453. Public political agents are agents sent by one Power to another for political negotiations of different kinds. They may be sent for an unlimited time, or for a limited time only. As they are not invested with diplomatic character, they do not receive a letter of credence, but only a letter of recommendation or commission. They may be sent not only by one full sovereign State to another, but also by and to insurgents recognised as a belligerent Power, and by and to States under suzerainty. Political agents without diplomatic character afford, in fact, the only means for personal political negotiations with such insurgents and with States under suzerainty.

Public Political Agents.

As regards the position and privileges of public political agents, it is obvious that they enjoy neither the position nor the privileges of diplomatic envoys.¹ But, on the other hand, they have a public character, being admitted as public political agents of a foreign State, and must, therefore, certainly be granted a special protection. No distinct rules, however, concerning the special privileges to be granted to such agents seem to have grown up in practice. Inviolability of their persons and official papers ought to be granted to them.²

§ 454. Secret political agents may be sent for the same purposes as public political agents. But two kinds of secrecy must be distinguished. An agent may be secretly sent to another Power with a letter of recom-

Secret Political Agents.

¹ Heffter, § 222, is, as far as I know, the only publicist who maintains that agents not invested with diplomatic character must nevertheless be granted the privileges of

diplomatic envoys.

² Ullmann, § 66, and Rivier, i. § 44, maintain that they *must* be granted the privilege of inviolability to the same extent as diplomatic envoys.

mentation, and admitted by that Power. Such an agent is secret in so far as third Powers do not know, or are not supposed to know, of his existence. As he is admitted by the receiving State, although secretly, his position is essentially the same as that of a public political agent. On the other hand, an agent may be secretly sent abroad for political purposes without a letter of recommendation, and therefore without being formally admitted by the Government of the State in which he is fulfilling his task. Such an agent has no recognised position whatever according to International Law. He is not an agent of a State for its relations with other States, and he is therefore in the same position as any other foreign individual living within the boundaries of a State. He may be expelled at any moment if he becomes troublesome, and he may be criminally punished if he commits a political or ordinary crime. Such secret agents are often abroad for the purpose of watching the movements of political refugees or partisans, or of socialists, anarchists, nihilists, and the like. As long as such agents do not turn into so-called *agents provocateurs*, the local authorities will not interfere.

Spies.

§ 455. Spies are secret agents of a State sent abroad ¹ for the purpose of obtaining clandestinely information in regard to military or political secrets. Although all States constantly or occasionally send spies abroad, and although it is not considered wrong morally, politically, or legally to do so, such agents have, of course, no recognised position whatever according to International Law, since they are not agents of States for their international relations. Every State punishes them severely when they are caught committing an act which is a crime by the law of the land, or expels them if they cannot be

¹ Concerning spies in time of war, see below, vol. ii. §§ 159 and 210, and Adler, *Die Spionage* (1906), pp. 7-62.

punished. A spy cannot legally excuse himself by pleading that he only executed the orders of his Government, and the latter will never interfere, since it cannot officially confess to having commissioned a spy.

§ 456. Commissaries and members of commissions Com-
missaries. are agents sent with a letter of recommendation or commission by one State to another for negotiations, not political, but of a technical or administrative character only; for instance, to make arrangements between the two States as regards railways, post, telegraphs, navigation, delineation of boundary lines, and so on. A distinct practice of guaranteeing certain privileges to commissaries has not grown up, but inviolability of their persons and official papers ought to be granted to them, as they are officially sent and received for official purposes. Thus Germany, in 1887, in the case of the French officer of police, Schnaebélé, who was invited by local German functionaries to cross the German frontier for official purposes, and then arrested, recognised the rule that a safe-conduct is tacitly granted to foreign officials when they enter the territory of a State in an official capacity with the consent of the local authorities, although Schnaebélé was not a commissary sent by his Government to the German Government.

§ 457. Individuals commissioned to carry official Bearers
of Des-
patches. despatches from a State to its head or to diplomatic envoys abroad are agents of that State. Despatch-bearers who belong to the retinue of diplomatic envoys as couriers must enjoy, as stated above (§ 405), exemption from civil and criminal jurisdiction, a special protection in the State to which the envoy is accredited, and a right of innocent passage through third States. But bearers of official despatches who are not in the retinue of the diplomatic envoys employing them must nevertheless be granted inviolability for their person and official papers, provided they possess special pass-

ports stating their official character as despatch-bearers. And the same is valid respecting bearers of despatches between the head of a State who is temporarily abroad and his Government at home.

IV

INTERNATIONAL COMMISSIONS

Rivier, i. pp. 564-566—Ullmann, § 68—Gareis, §§ 51-52—Liszt, § 16—
Moore, iv. § 623.

Perma-
nent in
contra-
distinc-
tion to
Tem-
porary
Commis-
sions.

§ 458. International commissions consist of persons delegated by two or more States to carry out functions of international importance. A distinction must be made between temporary international commissions which dissolve as soon as their purpose is accomplished,¹ and are very frequently established, and permanent international commissions. Temporary international commissions may be set up for all manner of purposes—inquiry into disputes, delimitation of frontiers, arrangement of all kinds of administrative questions such as railways, ports, telegraphs, navigation and the like. Among them may be mentioned commissions of inquiry, appointed in pursuance of the Hague Conventions of 1899 and 1907,² or of the Labour Convention which forms part of the Treaties of Peace,³ and the many temporary commissions established by these treaties.⁴ Permanent international commissions have been instituted by the Powers⁵ in the interest of free

¹ The position of their members has been discussed above, § 456.

² See below, vol. ii. § 5.

³ See Treaty of Peace with Germany, Article 412, and below, § 568i.

⁴ See, for example, the Treaty of Peace with Germany, Articles 203 (Inter-Allied Commissions of Control to supervise the Execution of the Military, Naval, and Air Clauses), 215 (Repatriation Commission), 233

(Reparation Commission). There are many others.

⁵ Only such permanent commissions are mentioned in the text as have been instituted by the Powers in conference. There are, however, many permanent commissions in existence which have been instituted by neighbouring Powers for local purposes, as for example: (1) The American - Canadian International

navigation on international rivers and the Suez Canal ¹; in the interest of international sanitation; in the interest of the foreign creditors of several States unable to pay the interest on their stocks; concerning bounties on sugar; to advise the Council of the League of Nations; in the interests of labour; and in the interests of air navigation. It is provided by the Covenant of the League of Nations (Article 24) that all commissions for the regulation of matters of international interest which are constituted after January 10, 1920, are to be placed under the direction of the League.

As regards the privileges to be granted to the members of either temporary or permanent international commissions, as was stated above, § 456, no distinct practice has grown up. If the treaty by which a commission is constituted does not stipulate anything as regards such privileges, none need be granted, but the persons of the commissioners must be specially protected. However that may be, there is no doubt that they cannot, unless this be specially stipulated, claim the privileges of diplomatic envoys. Thus, when in 1796 Gore and Pinkney,² the American commissioners in London under Article 7 of the Jay Treaty, claimed these privileges, Great Britain refused to concede them.

§ 459. Several international commissions have been agreed upon in the interest of navigation—namely, for the rivers Danube, Rhine, Elbe and Oder, and for the Suez Canal.

Com-
missions
in the
Interest
of Navi-
gation.

1. With regard to navigation on the Danube, the

Fisheries Commission, instituted according to Article 1 of the Treaty of Washington of April 11, 1908; see Treaty Ser. (1908), No. 17.
(2) The American-Canadian International Joint Commission concerning boundary waters, instituted by Articles 7-12 of the Treaty of Washington of January 11, 1909; see Treaty Ser. (1910), No. 23.
(3) The Permanent Mixed Fisheries

Commission between the United States, Canada, and Newfoundland, instituted in consequence of the award of the Hague Court of Arbitration in the *North Atlantic Fisheries* case.

¹ The Treaty of Peace with Turkey is to establish an international Commission to control the Bosphorus and the Dardanelles.

² See Moore, iv. § 623, p. 428.

European Danube Commission was instituted by Article 16 of the Peace Treaty of Paris in 1856. This commission, whose members were appointed by the signatory Powers of the Treaty of Paris, was reconstituted by the Berlin Conference in 1878 and again by the Conference of London in 1883. The commission was to be totally independent of the territorial Governments, its rights were clearly defined, and its members, offices, and archives were to enjoy the privilege of inviolability. The jurisdiction of the European Danube Commission extended from Ibraila downwards to the mouth of the river.¹

The Conference of 1883 also sanctioned regulations² in regard to the navigation and river-police of the Danube from the Iron Gates down to Ibraila, and, by Article 96 of these regulations, instituted the Mixed Commission of the Danube to enforce the observance of the regulations. The members of this commission were delegates from Austria-Hungary, Bulgaria, Roumania, Serbia, and the European Danube Commission—one member from each.³

But matters have changed since the World War. The Treaties of Peace foreshadow a thorough revision of the existing régime, and in the meantime the temporary arrangements made at the Peace Conference at Paris in 1919 are to be applied. The European Commission, provisionally constituted of representatives of Great Britain, France, Italy, and Roumania only, is to re-assume the powers which it possessed before the World War. From Ulm down to Ibraila, where the jurisdiction of the European Commission begins, the Danube system is to be placed under the control of a new international commission. This new commission is to undertake the administration of the river system according to the provisional rules for international rivers laid down

¹ Details in Twiss, i. §§ 150-152.

p. 394.

² Martens, *N.R.G.*, 2nd Ser. ix.

³ Details in Twiss, § 152.

in the Treaties of Peace¹ until the impending revision of existing arrangements, already referred to, is complete.²

2. With regard to the Rhine, navigation was before the World War governed by the Convention of Mannheim of 1868,³ under which a Central Commission had been established. But for the Rhine also the Treaties of Peace foreshadow a revision of the arrangements which existed before the World War, by agreement between the Allied and Associated Powers and Holland, and the task of preparing and submitting the project of revision is entrusted to the Central Commission provided for by the Convention of Mannheim, but now to be constituted in accordance with the Treaty of Peace with Germany. In the meantime the Central Commission is to continue to fulfil the duties assigned to it by the Convention of Mannheim as modified and supplemented by the Treaty of Peace with Germany.⁴

3. As regards rivers which have for the first time become international as the result of the World War,⁵ the Elbe and the Oder, and upon the request of any riparian State, the Niemen, are to be placed under the administration of international commissions.⁶

4. By Article 8 of the Treaty of Constantinople of 1888 in regard to the neutralisation of the Suez Canal, a commission was instituted for the supervision of the execution of that treaty.⁷

§ 460. Three international commissions had been established before the World War in the interest of sanitation. For the purpose of supervising the sanitary

¹ See above, § 178.

² See Treaty of Peace with Germany, Articles 346-352.

³ See above, § 178.

⁴ See Treaty of Peace with Germany, Articles 354-362.

⁵ See Treaty of Peace with Germany, Articles 340-345.

⁶ The Powers represented at the Berlin Congo Conference of 1884 sanctioned certain regulations in

regard to navigation on the Congo river, and agreed upon an international commission to enforce their observance. (See Calvo, i. § 334.) But this commission was never set up, and no provisions for the establishment of a commission are contained in the Convention of September 10, 1919, which repeals the Brussels General Act of 1885.

⁷ See above, § 183.

Commissions in the Interest of Sanitation.

arrangements in connection with the navigation on the lower part of the Danube, the International Council of Sanitation was instituted at Bucharest in 1881.¹ A *Conseil supérieur de santé* at Constantinople had the task of supervising the arrangements concerning cholera and plague. A *Conseil sanitaire maritime et quarantenaire* at Alexandria had similar tasks and was subject to the control of the *Conseil supérieur de santé* at Constantinople.² No information as to the position of these commissions since the World War seems to have been published.

Commissions in the Interest of Foreign Creditors.

§ 461. Three international commissions have been established in the interest of foreign creditors—namely, in Turkey since 1878, in Egypt since 1880, and in Greece since 1897.³

Permanent Commission concerning Sugar.

§ 462. Article 7 of the Brussels Convention of 1902 concerning bounties on sugar, provided for a permanent commission at Brussels,⁴ which is believed to be in abeyance.

Permanent Commissions to advise the League of Nations.

§ 462a. Under the Covenant of the League of Nations, two permanent commissions are to be appointed to advise the Council of the League, one on military, naval, and air questions, and the other on the observance of mandates.⁵

Permanent Commission in the Interest of Labour.

§ 462b. Under the Labour Convention which forms part of the Treaties of Peace, a governing body of twenty-four members is to be appointed to control the International Labour Office.⁶

Permanent International Commission for Air Navigation.

§ 462c. The International Air Convention of October 13, 1919, establishes an international commission for air

¹ See Article 6 of the 'Acte additionnel à l'Acte public du 2 novembre 1865 pour la Navigation des Embouchures du Danube,' signed on May 28, 1881; Martens, *N.R.G.*, 2nd Ser. viii. p. 207.

² Details in Liszt, § 16, iii.

³ See Kaufmann, *Das internationale Recht der ägyptischen*

Staatsschuld (1891); Murat, *Le Contrôle international sur les Finances de l'Égypte, de la Grèce et de la Turquie* (1899); Lippert, *Das internationale Finanzrecht* (1912), pp. 912-948.

⁴ See below, § 585 (3).

⁵ See above, § 167h.

⁶ See below, § 568i.

navigation to be under the direction of the League of Nations. Its chief duties have already been mentioned.¹

V

INTERNATIONAL OFFICES

Rivier, i. pp. 564-566—Nys, ii. pp. 314-318—Ullmann, § 69—Liszt, § 17—Gareis, § 52—Descamps, *Les Offices internationaux et leur Avenir* (1894)—Guillois in *R.G.*, xxii. (1915), pp. 5-127.

§ 463. During the second half of the nineteenth century and the early years of the twentieth century, a great number of general treaties were entered into by a greater or lesser number of States for the purpose of settling in common certain non-political matters. These general treaties created so-called unions among the parties, and the business of these unions is in most cases transacted by international offices created specially for that purpose. The functionaries of these offices, however, ordinarily enjoy no privilege whatever.

Character
of Inter-
national
Offices.

At the end of the World War many new international administrative offices were set up, as well as the Permanent Secretariat of the League of Nations,² which is the office of the organised Family of Nations. Moreover, in order to avoid the drawbacks which result from the existence of a number of separate and disconnected international offices, it is provided by the Covenant of the League (Article 24) that all international offices already established by general treaties, if the parties to such treaties consent, and all international offices set up in future, are to be placed under the direction of the League.

The most important international offices in existence before the World War are here enumerated,³

¹ See above, § 197c.

² See above, § 167g.

³ Except the International Bureau

of Arbitration, which, although an international office, has no relation to those here discussed. See below, § 474.

together with those which are provided for by treaties made since the close of hostilities.¹

Inter-national Telegraph Office. § 464. In 1868 the International Telegraph Office of the International Telegraph Union was created at Berne. It is administered under the supervision of the Swiss Bundesrath. It edits *Le Journal Télégraphique* in French.² This office also serves as the office of the International Union for Radiotelegraphy.³

Inter-national Post Office. § 465. The pendant of the International Telegraph Office is the International Post Office of the Universal Postal Union created at Berne in 1874. It is administered under the supervision of the Swiss Bundesrath, and edits a monthly paper, *L'Union Postale*, in French, German, and English.⁴

Inter-national Office of Weights and Measures. § 466. The States which have introduced the metric system of weights and measures created in 1875 the International Office of Weights and Measures in Paris. Its functionaries are a director and several assistants. Their task is the custody of the international prototypes of the metre and kilogramme, and the comparison of the national prototypes with the international.⁵

Inter-national Office for the Protection of Works of Literature and Art and of Industrial Property. § 467. In 1883 an International Union for the Protection of Industrial Property, and in 1886 an International Union for the Protection of Works of Literature and Art, were created, with an international office in Berne. There are a secretary-general and assistants, who edit a monthly paper, *Le Droit d'Auteur*, in French.⁶

§ 467a. The first Pan-American Conference of 1889

¹ The juristic character of these offices, other than those which form part of the organisation of the League of Nations, is hard to define. Although they are under the jurisdiction of the States on whose territory they are constituted, they are not constituted by them, and their laws are only applicable to such offices in so far as the treaties which called them into existence are silent. Since they are constituted by international treaties,

Fusinato, *Avis sur les Questions touchant la Personnalité juridique de l'Institut international d'Agriculture* (1914), fitly characterises them as international juristic persons, although it must be emphasised that they are not subjects of any international rights.

² See below, § 582 (2).

³ See below, § 582 (4).

⁴ See below, § 582 (1).

⁵ See below, § 588 (1).

⁶ See below, §§ 584 and 585 (2).

created 'The American International Bureau,' which, since the fourth conference of 1910, bears the name 'The Pan-American Union.' There are a director, an assistant director, and several secretaries. This office ¹ publishes a paper, *The Monthly Bulletin*.

The Pan-American Union.

§ 468. In accordance with the General Act of the Anti-Slavery Conference of Brussels, 1890, the International Maritime Office at Zanzibar and the 'Bureau Spécial,' attached to the Belgian Foreign Office at Brussels, were established; ² but the provisions of the Brussels General Act which set up these offices do not reappear in the Convention of September 10, 1919, which revised and repealed the Brussels General Act; their work seems to have been completed.

Former Maritime Office at Zanzibar, and Bureau Spécial at Brussels.

§ 469. The International Union for the Publication of Customs Tariffs, concluded in 1890, created an international office ³ at Brussels. There are a director, a secretary, and translators. The office edits *Le Bulletin des Douanes* in French, German, English, Italian, and Spanish.

International Office of Customs Tariffs.

§ 470. Nine States — namely, Austria - Hungary, Belgium, France, Germany, Holland, Italy, Luxemburg, Russia, Switzerland—entered in 1890 into an international convention in regard to transports and freights on railways and created the 'Office Central des Transports' ⁴ Internationaux' at Berne.

Central Office of International Transports.

§ 471. The States which concluded on March 5, 1902, at Brussels the Convention concerning Bounties on Sugar, ⁵ in compliance with Article 7 of this convention, instituted a permanent office at Brussels. The task of this office, which was attached to the permanent commission, ⁶ also instituted by Article 7, was to collect, translate, and publish information of all kinds respecting sugar; but it appears to be in abeyance.

Permanent Office of the Sugar Convention.

¹ See below, § 595.

² See below, § 592 (1).

³ See below, § 585 (1).

⁴ See below, § 583 (1).

⁵ See below, § 585 (3).

⁶ See above, § 462.

Agricultural Institute. § 471*a*. In 1905 the Agricultural Institute¹ was established at Rome. It consists of a General Assembly and a Permanent Committee with a general secretary.

International Health Office. § 471*b*. In 1907 the International Health Office² was established at Paris. It consists of a director, a general secretary, and a number of clerks. It publishes at least once a month a bulletin in French.

International Labour Office. § 471*c*. The treaties which constitute the resettlement after the World War have instituted a number of new international offices, which, in accordance with the Covenant and the express terms of the treaties themselves, are to be under the direction of the League of Nations.

The Labour Convention embodied in the Treaties of Peace³ established an International Labour Office at the seat of the League of Nations as part of the organisation of the League. The office is to be under the general control of the governing body, but under the immediate supervision of a director. Its staff is to consist of both men and women. Its principal functions are to collect and distribute information relating to the conditions of industrial life and labour, to prepare the agenda for the labour conferences, to carry out certain duties in connection with international disputes regulated by the Labour Convention, and to publish a periodical paper on the problems of international industry and employment.

Central Arms Office. § 471*d*. The Convention for the Control of the Trade in Arms and Ammunition,⁴ signed on September 10, 1919, provides for the establishment of a central international office, under the control of the League of Nations, to collect and preserve documents exchanged by the parties with regard to the trade in, and distribution of, the arms and ammunition specified in the convention.

¹ See below, § 586 (1).

² See below, § 590 (6).

³ See below, § 568*i*.

⁴ See below, § 568*c*.

§ 471e. The Convention relating to the Liquor Traffic in Africa,¹ signed on September 10, 1919, provides for the establishment of a central international office, under the control of the League of Nations, for collecting and preserving documents of all kinds exchanged by the parties with regard to the importation and manufacture of spirituous liquors, so far as regulated by the convention.

Central
Liquor
Office.

VI

THE INTERNATIONAL COURT OF ARBITRATION

Lawrence, § 221—Bonfils, No. 970^a—Despagnet, Nos. 736-740—Hershey, Nos. 314-316—Tettenborn, *Das Haagerschiedsgericht* (1911)—Schücking, *Der Staatenverband der Haager Conferenzen* (1912), pp. 39-66—Kohler in *Z. V.*, vii. (1913), pp. 113-122—Myers in *A. J.*, viii. (1914), pp. 769-801, and x. (1916), pp. 270-311.

§ 472. In compliance with Articles 20 to 29 of the first Hague Convention for the peaceful adjustment of international differences, the contracting Powers in 1900 organised the International Court of Arbitration at the Hague. This organisation² comprises three distinct bodies—namely, the Permanent Administrative Council of the Court, the International Bureau of the Court, and the Court of Arbitration itself. But a fourth body must also be distinguished—namely, the Tribunal to be constituted for the decision of each case. Articles 20 to 29 were replaced by Articles 41 to 50 of

Organisa-
tion of
Court in
general.

¹ See below, § 566.

² The editor does not know what view the author would have taken as to the future prospects of the organisation set up at the Hague under the Hague Conventions to deal with international disputes in the light of the establishment of the League of Nations. He believes, however, that the author would have

hoped that the work begun at the Hague would thereby receive new impetus; and this is perhaps the intention of the Covenant, which sets up no new Court of Arbitration, but provides (Article 13) that the court to which disputes are referred 'shall be the Court agreed on by the parties to the dispute or stipulated in any convention existing between them.'

the corresponding convention produced by the second Hague Peace Conference of 1907.

The Permanent Council.

§ 473. The Permanent Council (Article 49) consists of the diplomatic envoys of the contracting Powers accredited to Holland and the Dutch Secretary for Foreign Affairs, who acts as president of the Council. The task of the Council is to control the International Bureau of the Court, to appoint, suspend, and dismiss the *employés* of the bureau, to fix the payments and salaries, control general expenditure, and decide all questions of administration with regard to the business of the Court. The Council has, further, the task of furnishing the contracting Powers with a report of the proceedings of the Court, the working of the administration, and the expenses. At meetings duly summoned, the presence of nine members is sufficient to give the Council power to deliberate, and its decisions are taken by a majority of votes.

The International Bureau.

§ 474. The International Bureau (Article 43) serves as the registry for the Court. It is the intermediary for communications relating to the meetings of the Court. It has the custody of the archives, and the conduct of all the administrative business of the Court. The contracting Powers have to furnish the Bureau with a certified copy of every stipulation concerning arbitration arrived at between them, and of any award rendered by a special tribunal in which they are concerned. They likewise have to communicate to the Bureau the laws, regulations, and documents, if any, showing the execution of the awards given by the Court. The Bureau is (Article 47) authorised to place its premises and its staff at the disposal of the contracting Powers for the work of any special¹ tribunal of arbitration, not constituted within the International Court of Arbitration. The expense (Article 50) of the Bureau

¹ See below, vol. ii. § 20.

is borne by the contracting Powers, in the proportion established for the international office of the International Postal Union.

§ 475. The Court of Arbitration (Article 44) consists of a large number of individuals 'of recognised competence in questions of International Law, enjoying the highest moral reputation,' selected and appointed by the contracting Powers. Each Power may appoint not more than four members; two or more Powers may unite in the appointment of one or more members; and the same individual may be appointed by different Powers. Every member is appointed for a term of six years, but his appointment may be renewed. The place of a resigned or deceased member is to be refilled by the respective Powers, and in this case the appointment is made for a fresh period of six years. The names of the members of the Court thus appointed are enrolled upon a general list, which is to be kept up to date and communicated to all the contracting Powers. The Court thus constituted has jurisdiction over all cases of arbitration, unless there shall be an agreement between the parties for a special tribunal of arbitrators not selected from the list of the members of the Court (Article 42).

The Court
of Arbi-
tration.

§ 476. The Court of Arbitration does not as a body decide the cases brought before it; a Tribunal is created for every special case by selection of a number of arbitrators from the list of the members of the Court. This Tribunal (Article 45) may be created directly by agreement of the parties. If this is not done, the Tribunal is formed in the following manner: each party selects two arbitrators from the list, of whom one only can be its national or chosen from the persons appointed by it as members of the Permanent Court, and the four arbitrators so appointed choose a fifth as umpire and president. If the votes of the four are equal, the parties

The De-
ciding
Tribunal.

entrust to a third Power the choice of the umpire. If the parties cannot agree in their choice of such third Power, each party nominates a different Power, and the umpire is chosen by the united action of the Powers thus nominated. If within two months' time these two Powers cannot come to an agreement, each of them presents two candidates from the list of members of the Permanent Court, exclusive of the members selected by the parties, and not being nationals of either of them. Which of the candidates thus presented shall be the umpire is determined by lot.

When the Tribunal is so constituted, the parties communicate to the International Bureau of the Court the names of its members and fix a time for its meeting. The members of the Tribunal must be granted the privileges of diplomatic envoys when discharging their duties outside their own country (Article 46). The Tribunal sits at the Hague (Article 43), and, except in case of *force majeure*, the place of session can only be altered by the Tribunal with the assent of the parties, but the parties can from the beginning designate another place than the Hague as the venue of the Tribunal (Article 60). The expenses of the Tribunal are paid by the parties in equal shares, and each party pays its own expenses (Article 85).¹

The following awards² have hitherto been given by the Permanent Court of Arbitration :—

(1) On October 14, 1902, in the case of *The United States of America v. Mexico*, concerning les Fonds pieux des Californies.³

(2) On February 22, 1904, in the case of *Germany, Great Britain, and Italy v. Venezuela*, concerning certain claims of their subjects.⁴

¹ The procedure to be followed by, and before, the Tribunal is described below, vol. ii. § 21.

² See Wilson, *The Hague Arbitration Cases* (1915), and Scott, *The*

Hague Court Reports (1916).

³ Martens, *N. R. G.*, 2nd Ser. xxxii. p. 193.

⁴ Martens, *N. R. G.*, 3rd Ser. i. p. 57.

(3) On May 22, 1905, in the case of *Germany, France, and Great Britain v. Japan*, concerning the interpretation of Article 18 of the treaty of April 4, 1896, and of other treaties.¹

(4) On August 8, 1905, in the case of *France v. Great Britain*, concerning the Muscat Dhows.²

(5) On May 22, 1909, in the case of *Germany v. France*, concerning the Casa Blanca incident.³

(6) On October 23, 1909, in the case of *Norway v. Sweden*, concerning the question of their maritime frontier.⁴

(7) On September 7, 1910, in the case of *The United States of America v. Great Britain*, concerning the North Atlantic Fisheries.⁵

(8) On October 25, 1910, in the case of *The United States of America v. Venezuela*, concerning the claims of the Orinoco Steamship Co.⁶

(9) On February 24, 1911, in the case of *France v. Great Britain*, concerning the British-Indian Savarkar.⁷

(10) On May 3, 1912, in the case of *Italy v. Peru*, concerning the claim of the brothers Canevaro.⁸

(11) On November 11, 1912, in the case of *Russia v. Turkey*, concerning interest claimed on behalf of Russians for delay in payment of compensation for damages sustained during the Russo-Turkish War in 1877-1878.⁹

(12 and 13) On May 6, 1913, in the cases of *France v. Italy*, concerning the seizure of the French vessels, *Carthage* and *Manouba*, during the Turco-Italian War in 1911.¹⁰

(14) On June 25, 1914, in the case of *The Netherlands v. Portugal*, concerning a boundary in the Island of Timor.¹¹

¹ Martens, *N.R.G.*, 2nd Ser. xxxv. p. 376.

² Martens, *N.R.G.*, 2nd Ser. xxxv. p. 356.

³ Martens, *N.R.G.*, 3rd Ser. ii. p. 19.

⁴ Martens, *N.R.G.*, 3rd Ser. iii. p. 85.

⁵ Martens, *N.R.G.*, 3rd Ser. iv. p. 89.

⁶ Martens, *N.R.G.*, 3rd Ser. iv. p. 79.

⁷ Martens, *N.R.G.*, 3rd Ser. iv. p. 744.

⁸ Martens, *N.R.G.*, 3rd Ser. vi. p. 54.

⁹ Martens, *N.R.G.*, 3rd Ser. vi. p. 653.

¹⁰ Martens, *N.R.G.*, 3rd Ser. viii. pp. 174 and 179. The French and Italian Governments had also submitted to arbitration the case of the seizure of the vessel *Tavignano*. But no final award was given in this case, as the Governments at issue agreed to settle the matter out of court. See Martens, *N.R.G.*, 3rd Ser. viii. p. 172.

¹¹ *A.J.*, ix. (1915), p. 240.

VII

THE PROPOSED INTERNATIONAL PRIZE COURT AND THE
PROPOSED INTERNATIONAL COURT OF JUSTICE

Lawrence, § 192—Nys, ii. p. 577—Despagnet, No. 683 *bis*—Hershey, No. 317—Gregory in *A.J.*, ii. (1908), pp. 458-475—Scott, *The Hague Peace Conferences* (1909), i. pp. 465-511 and 423-464, and in *A.J.*, v. (1911), pp. 302-324, and vi. (1912), pp. 316-358—Wehberg, *Das Problem eines internationalen Staatengerichtshofes* (1912)—*Proceedings of the American Society of International Law*, vi. (1912), pp. 144-178—Schramm, *Das Prisenrecht* (1913), § 19—Lammasch, *Die Lehre von der Schiedsgerichtsbarkeit* (1913), pp. 137-146—Strupp, *Die internationale Schiedsgerichtsbarkeit* (1914), p. 84—Balch, *A World Court in the Light of the United States Supreme Court* (1918)—Reinsch in *A.J.*, v. (1911), pp. 604-614—Lehr in *R.I.*, 2nd Ser. xvi. (1914), pp. 137-156—Scott, *The Status of the International Court of Justice* (1916).

The Pro-
posed
Inter-
national
Prize
Court.

§ 476*a*. Convention XII. of the second Hague Peace Conference of 1907 provided for the establishment of an International Prize Court at the Hague, and when the last edition of this work was published it was anticipated that this court would be set up. But the convention failed to secure ratification. The court was to have consisted of fifteen judges and fifteen deputy judges, appointed for a period of six years. Of the fifteen judges nine were to constitute a quorum ; a judge who was absent or prevented from sitting was to be replaced by his deputy judge. Each contracting Power was to appoint one judge and one deputy judge, and the judges appointed by Great Britain, Germany, the United States of America, Austria-Hungary, France, Italy, Japan, and Russia were always to be summoned to sit, whereas the judges appointed by the other contracting Powers were to sit by rota, as shown in the table annexed to the convention. If a belligerent Power had, according to the rota, no judge sitting in the court, it had the right to ask that the judge appointed by it should take part in the settlement of all cases arising from the war ; lots were then to be drawn as to

which of the judges entitled to sit according to the rota should withdraw, but this arrangement was not to affect the judge appointed by the other belligerent. The belligerent captor was to be entitled to appoint a naval officer of high rank to sit as assessor, but with no voice in the decision; a neutral Power, which was a party to the proceedings or whose national was a party, was to have the same right of appointment. The seat of the International Prize Court was to be at the Hague.

As the convention remained unratified, no such court had been established when the World War broke out, and no further steps have been taken with regard to it.

§ 476*b*. Valuable as has been the Permanent Court of Arbitration at the Hague, it must be pointed out that it is not a real court of justice. For, in the first place, it is not itself a deciding tribunal, but only a list of names, out of which the parties in each case select, and thereby constitute the court. Secondly, experience teaches¹ that a court of arbitration endeavours rather to give an award *ex aequo et bono*, which more or less pleases both parties, than to decide the conflict in a judicial manner, by simply applying strict legal rules, without any consideration as to whether, or not, the decision will please either party. Thirdly, since in conflicts to be decided by arbitration the arbitrators are selected by the parties on each occasion, there are in most cases different individuals acting as arbitrators, so that there is no continuity in the administration of justice.

The Proposed International Court of Justice.

For these reasons it would be of the greatest value to institute, side by side with the Permanent Court of Arbitration, a real International Court of Justice, con-

¹ Balch (*Arbitration as a Term of International Law*, reprinted from the *Columbia Law Review*, 1915) contests this widely accepted statement, and maintains that arbitration courts have not in the past attempted to make a compromise

between the parties any more than do permanent municipal courts. On pp. 34-36 he makes some valuable suggestions for ensuring that in future courts of arbitration should not allow political considerations to enter into their decisions.

sisting of a number of judges in the technical sense of the term, who are once for all appointed, and would have to act in each case that the parties chose to bring before the court.¹ Such a court would only take the legal aspects of the case into consideration, and would base its decision on purely legal deliberations. It would secure continuity in the administration of international justice, because it would in each case consider itself bound by its former decisions. It would, in time, build up a valuable practice, by deciding innumerable controversies which as yet haunt the theory of International Law. The second Hague Peace Conference of 1907 discussed the question of creating such a court, but only produced the draft of a convention concerning the subject, which spoke of the creation of a judicial 'arbitration' court, and thereby obliterated the boundary line between the arbitral and the strictly judicial decision of international disputes.

However, there was no doubt that new attempts would be made to bring about the establishment of an International Court of Justice, in contradistinction to the Permanent Court of Arbitration, for the parties to a conflict frequently hesitate to have it settled by arbitration, whereas they would be glad to have it settled by a strictly judicial decision of the legal questions involved. In the same year, 1907, Costa Rica, Guatemala, Honduras, Nicaragua, and San Salvador established the 'Central American Court of Justice' at Cartago, consisting of five judges.² This court was never of more than local importance, and it came to an end in 1918;³ but it is of interest as having been the first of its kind.

¹ Different from this court would be an international court of justice for the settlement of money claims of private individuals against foreign States, as proposed by Wehberg, *Ein Internationaler Gerichtshof für*

Privatklagen (1911); see also Bar in *Z.I.*, vii. (1913), pp. 429-437.

² See *A.J.*, ii. (1908), Supplement, p. 231.

³ See *A.J.*, xii. (1918), p. 380.

A far more important attempt to establish an International Court of Justice is now being made. Article 14 of the Covenant of the League of Nations directs the Council to formulate plans for the establishment of such a court, to hear and determine any dispute of an international character which is submitted to it, and to give an advisory opinion on any matter referred to it by the Council or by the Assembly. Accordingly, on February 13, 1920,¹ the Council resolved to invite a committee of international jurists to prepare plans for the court, and this committee is now sitting (June 1920). The Treaties of Peace have in many cases provided that any dispute which should arise with regard to particular matters dealt with by them should be referred to this court when it has been established.²

¹ See *The Times*, February 14, 1920.

² The desire to secure the execution of arbitral awards, and the desire to protect the territories of neutrals from encroachments by powerful belligerents, have led, on the part of some imaginative writers, to the proposal to establish an international police force. See Vollenhoven in *R.I.*, 2nd Ser. xiii. (1911), pp. 79-85; Eysinga in *Z.V.*, v. (1911), pp. 527-534; Erich in *Z.V.*, vii. (1913), pp. 308-325. Erich (*loc. cit.*,

p. 324) also proposes the establishment of a special 'international' State, on whose territory the international police force should be stationed. It need hardly be stated that these, and similar, proposals are utopian. The idea of establishing an international court with an international army and navy to execute its judgments was put forward by Waldstein, *The Expansion of Western Ideals and the World's Peace* (1899), pp. 110-112.

PART IV

INTERNATIONAL TRANSACTIONS

CHAPTER I

ON INTERNATIONAL TRANSACTIONS IN GENERAL

I

NEGOTIATION

Heffter, §§ 234-239—Geffcken in *Holtzendorff*, iii. pp. 668-676—Liszt, § 20
—Ullmann, § 71—Bonfils, Nos. 792-795—Pradier-Fodéré, iii. Nos.
1354-1362—Rivier, ii. § 45—Calvo, iii. §§ 1316-1320, 1670-1673.

§ 477. International negotiation is the term for such intercourse between two or more States as is initiated, and directed, for the purpose of effecting an understanding between them on matters of interest. Since civilised States form a body knit together through their interests, such negotiation is, in some shape or other, constantly going on. No State of any importance can abstain from it in practice. There are many other international transactions,¹ but negotiation is by far the most important of them. And it must be emphasised that negotiation, as a means of amicably settling conflicts between two or more States, is only a particular kind of negotiation, although it will be specially discussed in another part of this work.²

§ 478. International negotiations can be conducted by all such States as have a standing within the Family of Nations. Full sovereign States are, therefore, the regular subjects of international negotiation. But it

¹ See below, §§ 486-490.

² See below, vol. ii. §§ 4-6.

would be wrong to maintain that States which are not fully sovereign can never be parties to international negotiations. For they can indeed conduct negotiations on those points concerning which they have a standing within the Family of Nations. Thus, for instance, while Bulgaria was a half sovereign State, she was nevertheless able to negotiate on several matters with foreign States independently of Turkey.¹ Or they may be separately represented at an international conference. For instance, the British Dominions—Canada, Australia, South Africa, New Zealand, and India—were separately represented at the Peace Conference at Paris in 1919.

It must be specially mentioned that negotiation between a State, on the one hand, and, on the other, a party which is not a State, is not *international* negotiation, although such party may reside abroad. Thus, negotiations between a State and the Pope, and the Holy See, are not international negotiations, although all the formalities connected with international negotiations are usually observed in this case. Thus, too, negotiations between States and a body of foreign bankers and contractors concerning a loan, the building of a railway, the working of a mine, and the like, are not international negotiations.

Purpose of
Negotia-
tion.

§ 479. Negotiations between States may have various purposes. Their purpose may be only an exchange of views on some political question; or it may be an arrangement as to the line of action to be taken in future with regard to a certain point, or a settlement of differences, or the creation of international institutions, such as the Universal Postal Union for example, and so on. Of the greatest importance are those negotiations which aim at an understanding between members of the Family of Nations respecting the very creation

¹ See above, § 91.

of rules of International Law by international conventions. Since the Vienna Congress at the beginning of the nineteenth century negotiations between the Powers for the purpose of defining, creating, or abolishing rules of International Law have been frequently conducted.¹

§ 480. International negotiations are conducted by the agents which represent the negotiating States. The heads of these States may conduct the negotiations in person, either by letters or by a personal interview. Serious negotiations have, in the past, been conducted by heads of States, and, although this is comparatively seldom done, there is no reason to believe that personal negotiations between heads of States will not occur in future.² Heads of States may also personally negotiate with diplomatic, or other, agents commissioned for that purpose by other States. Ambassadors, as diplomatic agents of the first class, must, according to International Law, have even the right to approach in person the head of the State to which they are accredited for the purpose of negotiation.³ As a rule, however, negotiation between States concerning more important matters is conducted by their Secretaries for Foreign Affairs, with the help, either of their diplomatic envoys, or of agents without diplomatic character, and so-called commissaries.⁴

Negotiations, by whom conducted.

§ 481. The Law of Nations does not prescribe any particular form in which international negotiations must be conducted. Such negotiations may, therefore, take place *viva voce*, or through the exchange of written representations and arguments, or both. The more important negotiations are regularly conducted through the diplomatic exchange of written communications, as only in this way can misunderstandings be avoided, which easily arise during *viva voce* negotiations. Of the

Form of Negotiation.

¹ See below, §§ 555-568c.

² See below, § 495.

³ See above, § 365.

⁴ Negotiations between armed forces of belligerents are regularly conducted by soldiers. See below, vol. ii. §§ 220-240.

greatest importance are the negotiations which take place through congresses and conferences.¹

During *viva voce* negotiations it happens sometimes that a diplomatic envoy negotiating with the Secretary for Foreign Affairs reads out a letter received from his home State. In such case it is usual to leave a copy of the letter at the Foreign Office. If a copy is refused, the Secretary for Foreign Affairs can, on his part, refuse to hear the letter read. Thus in 1825 Canning refused to allow a Russian communication to be read to him by the Russian ambassador in London with regard to the independence of the former Spanish colonies in South America, because this ambassador was not authorised to leave a copy of the communication at the British Foreign Office.²

End and
Effect of
Negotia-
tion.

§ 482. Negotiations may, and often do, come to an end without any effect whatever, on account of the parties failing to agree. On the other hand, if negotiations lead to an understanding, the effect may be two-fold. It may consist, either in a satisfactory exchange of views and intentions, and the parties are then in no way, at any rate not legally, bound to abide by such views and intentions, or to act on them in the future; or in an agreement on a treaty, and then the parties are legally bound by the stipulations of such treaty. Treaties are of such importance that it is necessary to discuss them in a special chapter.³

II

CONGRESSES AND CONFERENCES

Phillimore, ii. §§ 39-40—Twiss, ii. § 8—Taylor, §§ 34-36—Hershey, Nos. 292-294—Bluntschli, § 12—Heffter, § 242—Geffcken in *Holtzendorff*, iii. pp. 679-684—Ullmann, §§ 71-72—Bonfils, Nos. 796-814—Despagnet, Nos. 478-482—Pradier-Fodéré, vi. Nos. 2593-2599—Rivier, ii. § 46—

¹ See below, § 483.

² As regards the language used

during negotiation, see above, § 359.

³ See below, §§ 491-554.

Nys, ii. pp. 486-496—Calvo, iii. §§ 1674-1681—Fiore, ii. Nos. 1216-1224, and *Code*, Nos. 1211-1250—Martens, i. § 52—Charles de Martens, *Guide diplomatique*, i. § 58—Pradier-Fodéré, *Cours de Droit diplomatique* (1881), ii. pp. 372-425—Zaleski, *Die völkerrechtliche Bedeutung der Congressse* (1874)—Nippold, *Die Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten* (1907), pp. 480-526—Satow, *Diplomatic Practice*, ii. §§ 439-497—Myers in *A.J.*, viii. (1914), pp. 81-108.

§ 483. International congresses and conferences are formal meetings of the representatives of several States, for the purpose of discussing matters of international interest, and coming to an agreement concerning these matters. The term 'congress' as well as the term 'conference' may be used for the meetings of the representatives of only two States; but as a rule congresses or conferences denote such bodies only as are composed of the representatives of a greater number of States. Several writers¹ allege that there are characteristic differences between a congress and a conference. But all such alleged differences vanish in face of the fact that the Powers, when summoning a meeting of representatives, use the terms 'congress' and 'conference' indiscriminately. It is not even correct to say that the more important meetings are named congresses, in contradistinction to conferences, for the Hague Peace Conferences of 1899 and 1907 were, in spite of their great importance, denominated conferences.

Much more important than the mere terminological difference between 'congress' and 'conference' is the difference of the representatives who attend the meeting. For it may be that the heads of the States meet at a congress or conference, or that the representatives consist of diplomatic envoys and Secretaries for Foreign Affairs of the Powers. But, although congresses and conferences of heads of States have been held in the past, and might at any moment be held again in the

¹ See, for instance, Martens, i. § 52; Fiore, ii. §§ 1216-1224, and *Code*, No. 1236.

future, there can be no doubt that the most important matters are treated by congresses and conferences consisting of diplomatic representatives of the Powers.

Parties to
Con-
gresses
and Con-
ferences.

§ 484. Congresses and conferences not being organised by customary or conventional International Law, no rules exist with regard to the parties to a congress or conference. Everything depends upon the purpose for which a congress or a conference meets, and upon the Power which invites other Powers to the meeting. If it is intended to settle certain differences, it is reasonable that all the States concerned should be represented, for a Power which is not represented need not consent to the resolutions of the congress. If the creation of new rules of International Law is intended, at least all full sovereign members of the Family of Nations ought to be represented. To the first Peace Conference at the Hague, nevertheless, only the majority of States were invited to send representatives, the South American republics not being invited at all. But to the second Peace Conference of 1907, forty-seven States were invited, although only forty-four sent representatives. Costa Rica, Honduras, and Abyssinia, though invited, did not send any delegates.

It is frequently maintained that only full sovereign States can be parties to congresses and conferences. This is certainly not correct, since here, too, everything depends upon the merits of the special case. As a rule, full sovereign States only are parties, but there are exceptions. Thus the British Dominions—Canada, Australia, South Africa, New Zealand—and India were separately represented within the British Empire delegation at the Peace Conference at Paris in 1919. Again Bulgaria, at that time a vassal under Turkish suzerainty, was a party to the first and second Hague Peace Conferences, although without a vote. There is no reason to deny the rule that half and part sovereign States can

be parties to congresses and conferences in so far as they are able to negotiate internationally.¹ Such States are, in fact, frequently asked to send representatives to such congresses and conferences as meet for non-political matters. Moreover, there is no objection to admitting a delegate of the Pope to a congress or a conference, although the Holy See is not a State.

But no State can be a party which has not been invited, or admitted at its own request. If a Power thinks it fitting that a congress or conference should meet, it invites such other Powers as it pleases, though the invited Powers may accept upon condition that certain other Powers should, or should not, be invited or admitted. Those Powers which have accepted the invitation become parties, if they send representatives. Each party may send several representatives, but they have only one vote, given by the senior representative for himself and his subordinates.

§ 485. After the place and time of meeting have been arranged—such place may be neutralised for the purpose of securing the independence of the deliberations and discussions—the representatives meet, and constitute themselves, by exchanging their commissions, and electing a president and other officers. It is usual, but not obligatory,² for the Secretary for Foreign Affairs of the State within which the congress meets to be elected president. If the difficulty of the questions on the programme makes it advisable, special committees are appointed for the purpose of preparing the matter for discussion by the body of the congress. In such discussion all representatives can take part. After the discussion follows the voting. The motion must be carried unanimously to consummate the task of the

Procedure
at Con-
gresses
and Con-
ferences.

¹ See above, § 478.

was elected president. At the Peace Conference at Paris in 1919 the first French plenipotentiary was elected president.

² Thus at both Hague Peace Conferences the first Russian delegate

congress, for the vote of the majority does not in any way bind the dissenting parties. But it is possible for the majority to consider the motion binding for its members. A protocol is to be kept of all the discussions, and the voting. If the discussions and voting lead to a final result upon which the parties agree, all the points agreed upon are generally drawn up in an Act, which is signed by the representatives, and called the Final Act, or the General Act, of the congress or conference. A party can make a declaration or a reservation in signing the Act, for the purpose of excluding a certain interpretation of the Act in the future. And the Act may expressly stipulate freedom for States which were not parties to accede to it in future.

III

TRANSACTIONS BESIDES NEGOTIATION

Bluntschli, § 482—Hartmann, § 91—Gareis, § 77—Liszt, § 20.

Different
Kinds of
Transaction.

§ 486. International transaction is the term for every act on the part of a State in its intercourse with other States. Besides negotiation, which has been discussed above in §§ 477-482, there are eleven other kinds of international transactions which are of legal importance — namely, declaration, notification, protest, renunciation, recognition, intervention, retorsion, reprisals, pacific blockade, war, and subjugation. Recognition has already been discussed above in §§ 71-75, intervention in §§ 134-138, and subjugation in §§ 236-241. Retorsion, reprisals, pacific blockade, and war will be treated in the second volume of this work. There are, therefore, only four kinds of transaction to be discussed here—namely, declaration, notification, protest, and renunciation.

§ 487. The term 'declaration' is used in three different meanings. It is, in the first place, sometimes used as the title of a body of stipulations of a treaty, according to which the parties undertake to pursue in future a certain line of conduct. The Declaration of Paris, 1856, and the Declaration of St. Petersburg, 1868, are instances of this. Declarations of this kind differ in no respect from treaties.¹ Secondly, when States communicate to other States, or *urbi et orbi*, an explanation and justification of a line of conduct pursued by them in the past, or an explanation of views and intentions concerning certain matters, this is called a declaration. Declarations of this kind may be very important, but they hardly comprise transactions out of which rights and duties of other States follow. But there is a third kind of declaration from which rights and duties do follow for other States, and it is this kind which is to be regarded as an international transaction within the meaning of this part of this chapter. The different declarations belonging to this group are by no means of a uniform character; among them are declarations of war, declarations on the part of belligerents concerning the goods they will condemn as contraband, declarations at the outbreak of war on the part of third States that they will remain neutral, and others.

§ 488. Notification is the technical term for the communication to other States of certain facts and events of legal importance. But a distinction must be drawn between obligatory and merely usual notification.

Notification has been stipulated in several cases to be obligatory. Thus, according to Article 34 of the General Act of the Berlin Congo Conference of 1885, which has now been repealed by a convention signed at St. Germain on September 10, 1919, notification of

¹ See below, § 508, where is mentioned the attempt of the British

Foreign Office to give to the term 'declaration' a specific meaning.

new occupations and the like on the African coast was obligatory. Thus, further, according to Article 84 of the Hague Convention for the peaceful adjustment of international differences, in case a number of States are parties to a treaty, and two of them, who are at variance concerning its interpretation, agree to have the difference settled by arbitration, they have to notify this agreement to all the other parties. Again, according to Article 2 of the Hague Convention concerning the Commencements of Hostilities, 1907, the outbreak of war must be notified to the neutral Powers; and the declaration of a blockade was also to be notified,¹ according to Article 11 of the unratified Declaration of London, 1909.

Apart from cases in which notification is stipulated as obligatory, it is, in principle, not obligatory, although, in fact, it frequently takes place, because States cannot be considered subject to certain duties without knowledge of the facts and events which give rise to them. Thus it is usual to notify to other States changes in the headship, and in the form of government of a State, the establishment of a Federal State, an annexation after conquest, the appointment of a new Secretary for Foreign Affairs, and the like.

Protest.

§ 489. Protest is a formal communication from one State to another that it objects to an act performed, or contemplated, by the latter. A protest serves the purpose of preservation of rights, or of making it known that the protesting State does not acquiesce in, and does not recognise, certain acts. A State can lodge a protest with another State against acts which have been notified to the protesting State, or which have otherwise become known. On the other hand, if a State acquires knowledge of an act which it considers internationally illegal,

¹ See also the unratified Declaration of London, Articles 11 (2), 16, 23, 25, and 26.

and against its rights, and nevertheless does not protest, this attitude implies a renunciation of such rights, provided that a protest would have been necessary to preserve a claim. It may further happen that a State at first protests, but afterwards either expressly¹ or tacitly acquiesces in the act. And it must be emphasised that, under certain circumstances and conditions, a simple protest on the part of a State, without further action, is not in itself sufficient to preserve the rights in behalf of which the protest was made.²

§ 490. Renunciation is the deliberate abandonment of rights. It can be given *expressis verbis* or tacitly. Renuncia-
tion. If, for instance, a State by occupation takes possession of an island which has previously been occupied by another State,³ the latter tacitly renounces its rights by not protesting as soon as it receives knowledge of the fact. Renunciation plays a prominent part in the amicable settlement of differences between States, either one or both parties frequently renouncing their claims for the purpose of coming to an agreement. But it must be specially observed that mere silence on the part of a State does not imply renunciation; this occurs only when a State remains silent, although a protest is necessary to preserve a claim.

¹ Thus by the Declaration concerning Siam, Madagascar, and the New Hebrides, which was embodied in the Anglo-French Agreement of April 8, 1904, Great Britain withdrew the protest which she had raised against the introduction of the customs tariff established at

Madagascar after its annexation to France.

² See below, § 539, concerning the withdrawal of Russia from Article 59 of the Treaty of Berlin, 1878, stipulating the freedom of the port of Batoum.

³ See above, § 247.

CHAPTER II

TREATIES

I

CHARACTER AND FUNCTION OF TREATIES

Vattel, ii. §§ 152, 153, 157, 163—Hall, § 107—Phillimore, ii. § 44—Twiss, i. §§ 224-233—Taylor, §§ 341-342—Hershey, Nos. 295-296—Bluntschli, § 402—Heffter, § 81—Despagnet, Nos. 435-436—Pradier-Fodéré, ii. Nos. 888-919—Rivier, ii. pp. 33-40—Nys, ii. pp. 497-498, and 522-530—Calvo, iii. §§ 1567-1584—Fiore, ii. Nos. 976-982—Martens, i. § 103—Bergbohm, *Staatsverträge und Gesetze als Quellen des Völkerrechts* (1877)—Jellinek, *Die rechtliche Natur der Staatenverträge* (1880)—Laghi, *Teoria dei Trattati internazionali* (1882)—Buonamici, *Dei Trattati internazionali* (1888)—Nippold, *Der völkerrechtliche Vertrag* (1894)—Triepel, *Völkerrecht und Landesrecht* (1899), pp. 27-90—Grosch, *Der Zwang im Völkerrecht* (1912), pp. 38-56, 138-143—Crandall, *Treaties; their Making and Enforcement*, 2nd ed. (1916)—Lammasch, *Das Völkerrecht nach dem Kriege* (1917), pp. 92-129—Satow, *Diplomatic Practice*, ii. §§ 498-534.

Concep-
tion of
Treaties.

§ 491. International treaties are conventions, or contracts, between two or more States concerning various matters of interest. Even before a Law of Nations, in the modern sense of the term, was in existence, treaties used to be concluded between States. And although in those times treaties were neither based on, nor were themselves a cause of, an International Law, they were nevertheless considered sacred, and binding, on account of religious and moral sentiment. However, since the manifold intercourse of modern times did not then exist between the different States, treaties did not discharge such all-important functions in the life of humanity as

they do now. It has been estimated that the number of treaties in force between the several States at the outbreak of the World War exceeded eight thousand, and although a number were abrogated by the war, the number is again increasing daily.

A treaty, being a contract, must not be confounded with various documents having relation to treaties without themselves being treaties—namely, a *memoire*, a *proposal*, a *note verbal*, or a *protocol*. A *memoire* or *memorandum* is a diplomatic note containing a summary exposition of the principal facts of an affair. A *proposal* is a document comprising an offer submitted by one State to another. A *note verbal* is an unsigned document containing a summary of conversations or of events, and the like. A *protocol* is an official report of proceedings or of facts, signed by the interested parties.

§ 492. The important functions of treaties are manifest if attention is given to the variety which exist nowadays, and are day by day concluded for innumerable purposes. In regard to State property, treaties of cession, boundary treaties, and many others are concluded. Alliances, treaties of protection, of guarantee, of neutrality, and of peace are concluded for political purposes. Various purposes are served by consular treaties, commercial¹ treaties, treaties in regard to the post, telegraphs, and railways, treaties relating to copyright and the like, to jurisdiction and to extradition, monetary treaties, treaties in regard to measures and weights, to rates, taxes, and customs duties, sanitation treaties with respect to epidemics, treaties in the interest of industrial labourers, and treaties with regard to agriculture and industry. Again, various purposes are served by treaties concerning warfare, mediation, arbitration, and so on.

Different
Kinds of
Treaties.

I do not intend to discuss the question of classifica-

¹ See below, §§ 578-580.

tion of the different kinds of treaties, for hitherto all attempts¹ at such classification have failed. But there is one distinction to be made, which is of the greatest importance, and according to which the whole body of treaties is to be divided into two classes. In one class are treaties concluded for the purpose of confirming, defining, or abolishing existing customary rules, and of establishing new rules for the Law of Nations. Treaties of this kind ought to be termed *law-making* treaties. Into the other class fall treaties concluded for any other purpose. Law-making treaties as a source of rules of International Law have been discussed above (§ 18); the most important of these treaties will be considered below (§§ 556-568c).

Binding
Force of
Treaties.

§ 493. The question why international treaties have binding force, always was, and still is, very much disputed. That all those publicists who deny the legal character of the Law of Nations deny likewise a legally binding force in international treaties is obvious. But even among those who acknowledge the legal character of International Law, unanimity by no means exists concerning the binding force of treaties. The question is all the more important as everybody knows that treaties are sometimes broken, rightly according to the opinion of the one party, and wrongly according to the opinion of the other. Many publicists find the binding force of treaties in the Law of Nature; others in religious and moral principles; others² again in the self-restraint exercised by a State in becoming a party to a treaty. Some writers³ assert that it is the will of the contracting parties which gives binding force to their treaties;

¹ Since the time of Grotius, the science of the Law of Nations has not ceased attempting a satisfactory classification of the different kinds of treaties. See Heffter, §§ 89-91; Bluntschli, §§ 442-445; Martens, i. § 113; Ullmann, § 82; Wheaton,

§ 268 (following Vattel, ii. § 169); Rivier, ii. pp. 106-118; Westlake, i. p. 294, and many others.

² So Hall, § 107; Jellinek, *Staatenverträge*, p. 31; Nippold, § 11.

³ So Triepel, *Völkerrecht und Landesrecht* (1899), p. 82.

and others ¹ teach that such binding force is to be found *im Rechtsbewusstsein der Menschheit*—that is, in the idea of right innate in man. I believe that the question can satisfactorily be dealt with only by dividing it into several different questions, and by answering those questions *seriatim*.

First, the question is to be answered why treaties are legally binding. The categorical answer must be that this is so because there exists a customary rule of International Law that treaties are binding.

Then the question might be put as to the cause of the existence of such customary rule. The answer must be that such rule is the product of several joint causes. Religious and moral reasons require such a rule, quite as much as the interest of the States, for no law could exist between nations, if such rule did not exist. All causes which have been, and are still, working to create, and maintain, an International Law are at the background of this question.

And, thirdly, the question might be asked, how it is possible to speak of treaties having legally binding force without a judicial authority to enforce their stipulations. The answer must be that the binding force of treaties, although it is a legal force, is not the same as the binding force of contracts according to Municipal Law, since International Law is a weaker law, and for this reason less enforceable, than Municipal Law. But just as International Law does not lack legal character, in consequence of the fact that there is no central authority ² above the States which could enforce it, so international treaties are not deficient of a legally binding force, because there is no judicial authority for the enforcement of their stipulations.

¹ So Bluntschli, § 410.

² See above, § 5.

II

PARTIES TO TREATIES

Vattel, ii. §§ 154-156, 206-212—Hall, § 108—Westlake, i. p. 290—Phillimore, ii. §§ 48-49—Taylor, §§ 361-365—Hershey, No. 297—Wheaton, §§ 265-267—Moore, v. §§ 734-737—Bluntschli, §§ 403-409—Heffter, §§ 84-85—Ullmann, § 75—Bonfils, No. 818—Despagnet, No. 446—Pradier-Fodéré, ii. Nos. 1058-1068—Rivier, ii. pp. 45-48—Nys, ii. pp. 499-500—Calvo, iii. §§ 1616-1618—Fiore, ii. Nos. 984-1000, and *Code*, Nos. 748-754—Martens, i. § 104—Nippold, *op. cit.*, pp. 104-111—Crandall, *op. cit.*, §§ 1-5—Schoen in *Z. V.*, v. (1911), pp. 400-431.

The
Treaty-
making
Power.

§ 494. The so-called right of making treaties is not a right belonging to a State in the technical meaning of the term, but a mere competence attaching to sovereignty. A State possesses, therefore, treating-making power only so far as it is sovereign. Full sovereign States may become parties to treaties of all kinds, being regularly competent to make treaties on whatever matters they please. Not-full sovereign States, however, can become parties only to such treaties as they are competent to conclude. It is impossible to lay down a hard and fast rule defining the competence of all not-full sovereign States. Everything depends upon the special case. Thus, the constitutions of Federal States comprise provisions with regard to the competence, if any, of the member-States to conclude international treaties among themselves as well as with foreign States.¹ Thus, again, it depends upon the

¹ According to Articles 7 and 9 of the Constitution of Switzerland the Swiss member-States are competent to conclude non-political treaties among themselves, and, further, such treaties with foreign States as concern matters of police, of local traffic, and of State economics. According to Article 78 of the German Constitution adopted since the World War, the German member-States are competent to conclude agreements with foreign States as to

affairs regulated by State legislation; but these agreements require the consent of the Federation. On the other hand, according to Article 1, § 10, of the Constitution of the United States of America, the member-States are not competent to conclude treaties either among themselves or with foreign States. On the treaty-making power of the United States, see Tucker, *Limitations on the Treaty-making Power under the Constitution of the United States* (1915).

special relation between the suzerain and the vassal how far the latter possesses the competence to enter into treaties with foreign States; ordinarily a vassal can conclude treaties concerning such matters as railways, extradition, commerce, and the like.

§ 495. The treaty-making power of States is, as a rule, exercised by their heads, either personally, or through representatives appointed by these heads. The Holy Alliance of Paris, 1815, was personally concluded by the Emperors of Austria and Russia and the King of Prussia. And when, on June 24, 1859, the Austrian army was defeated at Solferino, the Emperors of Austria and France met on July 11, 1859, at Villafranca, and agreed in person on preliminaries of peace. Yet, as a rule, heads of States do not act in person, but authorise representatives to act for them. Such representatives receive a written commission, known as powers, or full powers, which authorise them to negotiate in the name of the respective heads of States. They also receive oral or written, open or secret instructions. But, as a rule, they do not conclude a treaty finally, for all treaties concluded by such representatives are, in principle, not valid before ratification.¹ If they conclude a treaty by exceeding their powers, or acting contrary to their instructions, the treaty is not a real treaty, and not binding upon the State they represent. A treaty of such a kind is called a *sponsio*, or *sponsiones*. *Sponsiones* may become a real treaty, and binding upon the State, through the latter's approval. Nowadays, however, the difference between real treaties and *sponsiones* is less important than in former times, when the custom in favour of the necessity of ratification for the validity of treaties was not yet general. If nowadays representatives exceed their powers, their States can simply refuse ratification of the *sponsio*. Be that as it may, while,

Treaty-making Power exercised by Heads of States or their Governments.

¹ See below, § 510.

as a rule, the treaty-making power of States is exercised by their heads, the constitutional practice of some States assigns it, so far as many matters are concerned, to their Governments. In such a case it is the Government, and not the head of the State, which must ratify the treaty, in order to make it binding.

Minor
Function-
aries
exercising
Treaty-
making
Power.

§ 496. For some non-political purposes of minor importance, certain minor functionaries are recognised as competent to exercise the treaty-making power of their States, which is, so to say, delegated to them. Such functionaries are *ipso facto*, by their offices and duties, competent to enter into certain agreements without the requirement of ratification. Thus, for instance, in time of war, military and naval officers in command¹ can enter into agreements concerning a suspension of arms, the surrender of a fortress, the exchange of prisoners, and the like. But it must be emphasised that treaties of this kind are valid only when these functionaries have not exceeded their powers.

Self-
governing
Domin-
ions and
Treaty-
making
Power.

§ 496a. Again, the treaty-making power belonging to a full sovereign State may be for certain purposes, or to a certain extent, delegated according to the constitutional practice of that State by the central Government to the self-governing portions of the territory of that State. Thus, the British self-governing Dominions negotiate and conclude tariff arrangements with foreign States, and the Imperial Government is not in the habit of interfering, unless general imperial interests, or treaty obligations undertaken by Great Britain towards foreign States, are involved.²

Constitu-
tional
Restric-
tions.

§ 497. Although the heads of States are regularly, according to the Law of Nations, the organs that exercise the treaty-making power of the States, constitutional restrictions imposed upon the heads concerning the

¹ See Grotius, iii. c. 22.

² On the general position of self-

governing Dominions in Interna-
tional Law, see above, §§ 94a, 94b.

exercise of this power are nevertheless of importance for the Law of Nations. Such treaties concluded by heads of States, or representatives authorised by these heads, as violate constitutional restrictions are not real treaties, and do not bind the State concerned, because the representatives have exceeded their powers in concluding the treaties.¹ Such constitutional restrictions, although they are not of great importance in Great Britain,² play a prominent part in the constitutions of most countries.³ Thus, according to Article 8 of the French Constitution, the President exercises the treaty-making power; but peace treaties and such other treaties as concern commerce, finance, and some other matters, are not valid without the co-operation of the French Parliament. Thus, further, according to Article 45 of the German Constitution, the President exercises the treaty-making power in the name of the Federation; but such treaties as refer to subjects of Federal legislation require the consent of the Reichstag. Again, according to Article 2, § 2, of the Constitution of the United States, the President can only ratify treaties with the consent of the Senate.

§ 498. A treaty being a convention, mutual consent of the parties is necessary. Mere proposals made by one party, and not accepted by the other, are, therefore, not binding upon the proposer. Without force are also pollicitations, which contain mere promises without acceptance by the party to whom they were made. Not binding are, lastly, so-called *punctationes*, mere negotiations on the items of a future treaty, without the parties entering into an obligation to conclude that treaty. But such *punctationes* must not be confounded,

Mutual
Consent of
the Con-
tracting
Parties.

¹ The whole matter is discussed with great lucidity by Nippold, *op. cit.*, pp. 127-164; see also Schoen, *loc. cit.*

² See Anson, *The Law and Custom of the Constitution*, ii. (2nd ed.),

pp. 297-300.

³ See Crandall, *op. cit.*, §§ 33-154, where the constitutional rules concerning the making of treaties which prevail in the United States, and in most other countries, are discussed.

either with a preliminary treaty, or with a so-called *pactum de contrahendo*. A preliminary treaty requires the mutual consent of the parties with regard to certain important points, whereas other points have to be settled by the definitive treaty to be concluded later. Such preliminary treaty is a real treaty, and therefore binding upon the parties. A *pactum de contrahendo* requires likewise the mutual consent of the parties. It is an agreement upon certain points to be incorporated in a future treaty, and is binding upon the parties. The difference between *punctationes* and a *pactum de contrahendo* is, that the latter imposes an obligation on the parties to settle the points in question by a treaty, whereas the former does not.

Freedom
of Action
of Con-
senting
Represent-
atives.

§ 499. As a treaty will lack binding force without real consent, absolute freedom of action on the part of the contracting parties is required. It must, however, be understood that circumstances of urgent distress, such as either defeat in war, or the menace of a strong State to a weak State, are, according to the rules of International Law, not regarded as excluding the freedom of action of a party consenting to the terms of a treaty. The phrase 'freedom of action' applies only to the *representatives* of the contracting States. It is *their* freedom of action in consenting to a treaty which must not have been interfered with, and which must not have been excluded by other causes. A treaty concluded through intimidation exercised against the representatives of either party, or concluded by intoxicated or insane representatives, is not binding upon the party so represented. But a State which was forced by circumstances to conclude a treaty containing humiliating terms has no right afterwards to shake off the obligations of such a treaty on the ground that its freedom of action was interfered with at the time.¹ This must be

¹ See examples in Moore, v. § 742.

emphasised, because, in practice, such cases of repudiation have frequently occurred. A State may, of course, hold itself justified by political necessity in shaking off such obligations, but this does not alter the fact that such action is a breach of law.

§ 500. Although a treaty was concluded with the real consent of the parties, it is nevertheless not binding if the consent was given in error, or under a delusion produced by a fraud of the other contracting party. If, for instance, a boundary treaty were based upon an incorrect map, or a map fraudulently altered by one of the parties, such treaty would by no means be binding. Although there is freedom of action in such cases, consent has been given under circumstances which prevent the treaty from being binding.

Delusion
and Error
in Con-
tracting
Parties.

III

OBJECTS OF TREATIES

Vattel, ii. §§ 160-162, 166—Hall, § 108—Phillimore, ii. § 51—Walker, § 30—Bluntschli, §§ 410-416—Heffter, § 83—Ullmann, § 79—Bonfils, No. 819—Despagnet, No. 445—Pradier-Fodéré, ii. Nos. 1080-1083—Mérignhac, ii. p. 640—Rivier, ii. pp. 57-63—Nys, ii. pp. 503-504—Fiore, ii. Nos. 1001-1004, and *Code*, Nos. 760-763—Martens, i. § 110—Jellinek, *Die rechtliche Natur der Staatenverträge* (1880), pp. 59-60—Nippold, *op. cit.*, pp. 181-190.

§ 501. The object of treaties is always an obligation, whether mutual between all the parties, or unilateral on the part of one only. Speaking generally, the object of treaties can be an obligation concerning any matter of interest for States. Since there exists no other law than International Law for the intercourse of States with each other, every agreement between them regarding any obligation whatever is a treaty. However, the Law of Nations prohibits some obligations from becoming objects of treaties, so that such treaties as comprise

Objects in
general of
Treaties.

obligations of this kind are, from the very beginning, null and void.¹

Obligations of Contracting Parties only can be Object.

§ 502. Obligations to be performed by a State other than a contracting party cannot be the object of a treaty. A treaty stipulating such an obligation would be null and void. But this must not be confounded with an obligation undertaken by one of the contracting States to exercise an influence upon another State to perform certain acts. The object of a treaty with such a stipulation is an obligation of one of the contracting States, and the treaty is therefore valid and binding.

An Obligation inconsistent with other Obligations cannot be an Object.

§ 503. An obligation inconsistent with obligations under treaties previously concluded by one State with another cannot be the object of a treaty with a third State. Thus, in 1878, when, after the war, Russia and Turkey concluded the preliminary Treaty of Peace of San Stefano, which was inconsistent with the Treaty of Paris of 1856 and the Convention of London of 1871, England protested,² and the Powers met at the Congress of Berlin to arrange matters by mutual consent.

Object must be Physically Possible.

§ 504. An obligation to perform a physical impossibility³ cannot be the object of a treaty. If perchance a State entered into a convention stipulating an obligation of that kind, no right to claim damages for non-fulfilment of the obligation would arise for the other party, such treaty being legally null and void.

Immoral Obligations.

§ 505. It is a customarily recognised rule of the Law of Nations that immoral obligations cannot be the object of an international treaty. Thus, an alliance for the purpose of attacking a third State without provocation is, from the beginning, not binding. It cannot be denied that in the past many treaties stipulating

¹ The voidance *ab origine* of these treaties must not be confounded with voidance of such treaties as are valid in their inception, but become afterwards void on some ground or

other; see below, §§ 541-544.

² See Martens, *N.R.G.*, 2nd Ser. iii. p. 257.

³ See below, § 542.

immoral obligations have been concluded and executed, but this does not alter the fact that such treaties were legally not binding upon the contracting parties. It must, however, be taken into consideration that the question as to what is immoral is often controversial. An obligation which is considered immoral by other States may not necessarily appear immoral to the contracting parties, and there is no court that can decide the controversy.

§ 506. It is a unanimously recognised customary rule of International Law that obligations which are at variance with universally recognised principles of International Law cannot be the object of a treaty. If, for instance, a State entered into a convention with another State not to interfere in case the latter should appropriate a certain part of the open sea, or should command its vessels to commit piratical acts on the open sea, such treaty would be null and void, because it is a principle of International Law that no part of the open sea can be appropriated, and that it is the duty of every State to interdict to its vessels the commission of piracy on the high seas.

Illegal
Obligations.

IV

FORM AND PARTS OF TREATIES

Grotius, ii. c. 15, § 5—Vattel, ii. § 153—Hall, § 109—Westlake, i. pp. 290-291—Wheaton, § 253—Moore, v. § 740—Hershey, No. 298—Bluntschli, §§ 417-427—Hartmann, §§ 46-47—Heffter, §§ 87-91—Ullmann, § 80—Bonfils, Nos. 821-823—Pradier-Fodéré, ii. Nos. 1084-1099—Mérignhac, ii. p. 645—Rivier, ii. pp. 64-68—Nys, ii. pp. 504-507—Fiore, ii. Nos. 1004-1006, and *Code*, Nos. 764-768—Martens, i. § 112—Jellinek, *Die rechtliche Natur der Staatenverträge* (1880), p. 56—Nippold, *op. cit.*, pp. 178-181—Crandall, *op. cit.*, § 6.

§ 507. The Law of Nations includes no rule which prescribes a necessary form of treaties. A treaty is, therefore, concluded as soon as the mutual consent of

No Necessary Form of Treaties.

the parties becomes clearly apparent. Such consent must always be given expressly, or by unmistakable conduct, for a treaty cannot be concluded by mere tacit acquiescence¹ or mere passivity. But it matters not whether an agreement is made orally, or in writing, or by such conduct as implies mutual consent, as, for instance, when an agreement is made by symbols. Thus, in time of war, the exhibition of a white flag symbolises the proposal of an agreement as to a brief truce, for the purpose of certain negotiations, and the acceptance of the proposal on the part of the other side by the exhibition of a similar symbol establishes a convention as binding as any written treaty. Thus, too, history tells of an oral treaty of alliance, secured by an oath, concluded in 1697 at Pillau between Peter the Great of Russia and Frederick III., Elector of Brandenburg.² Again, treaties are sometimes concluded through the exchange of personal letters between the heads of two States, or through the exchange of diplomatic notes; for instance, the important so-called Rush-Bagot Treaty between the United States of America and Great Britain of April 28/29, 1817, concerning naval forces on the Great Lakes, was concluded by an exchange of diplomatic notes between Charles Bagot, the British minister at Washington, and Richard Rush, the acting American Secretary of State. However, as a matter of reason, treaties usually take the form of a written³ document, signed by duly authorised representatives of the contracting parties.

§ 508. International compacts which take the form of

¹ Tacit acquiescence must not be confounded with what in English law is sometimes called 'tacit consent,' i.e. a contract which is not made in writing or orally, but is inferred from conduct.

² See Martens, i. § 112.

³ The only writer who nowadays insists that a *written* agreement is

necessary for a treaty to be valid is, as far as I know, Bulmerincq (§ 56). But although all important treaties are naturally concluded in writing, the example of the agreements concluded between armed forces in time of war, either orally, or through symbols, proves that the written form is not absolutely necessary.

written contracts are sometimes termed not only *agreements* or *treaties*, but *acts*, *conventions*, *declarations*, *protocols*, and the like. But there is no essential¹ difference between them, and their binding force upon the contracting parties is the same, whatever be their name. The Geneva Convention, the Declaration of Paris, and the Final Act of the Vienna Congress are as binding as any agreement which goes under the name of 'treaty' or 'convention.' The attempt² to distinguish fundamentally between a 'declaration' and a 'convention' by maintaining that, whereas a 'convention' creates rules of particular International Law between the contracting States only, a 'declaration' contains the recognition, on the part of the best qualified and most interested Powers, of rules of universal International Law, does not stand the test of scientific criticism. This becomes apparent from the mere fact that the Declaration of Paris of 1856 had not been agreed to by the United States of America, or by many other States, at the time of its promulgation.

Acts, Con-
ventions,
Declara-
tions, etc.

A 'declaration' is nothing else than the title of a law-making treaty, according to which the parties engage themselves to pursue in future a certain line of conduct.³ But such law-making treaties are quite as frequently styled 'conventions' as 'declarations.' The best example is the Hague 'Convention' concerning the laws and usages of war, which is based upon the unratified 'declaration' concerning the laws and customs of war produced by the Brussels Conference of 1874.

Again, the distinction made by the Government of the United States between *treaties*, which can only be

¹ The distinction between 'agreement' and 'contract' in English law—see Anson, *Contract*, 11th ed. (1911), pp. 2-3—does not exist in International Law.

² On the part of the British

Foreign Office, see *Parliamentary Papers*, Misc., No. 5 (1909), Cd. 4555, Proceedings of the International Naval Conference held in London, 1908-1909, p. 57.

³ See above, § 487.

ratified by the President with the consent of the Senate, and *agreements*, which do not require such consent,¹ has nothing to do with International Law. It is a distinction according to the constitutional law—or the constitutional practice—of the United States. And the distinction made by the British Foreign Office² between treaties and one class of conventions on the one hand, and another class of conventions, together with most agreements and declarations, on the other hand, according to which the former instruments are said to be concluded in the name of the heads of the States concerned, and the latter in the name of the respective ‘Governments,’ has nothing to do with International Law.

Parts of
Treaties.

§ 509. Since International Law lays down no rules concerning the form of treaties, there exist no rules concerning the arrangement of the parts of written treaties. But the following order is usually observed. A first part, the so-called *preamble*, comprises the names of the heads of the contracting States, of their duly authorised representatives, and the motives for the conclusion of the treaty. A second part consists of the primary stipulations in numbered articles. A third part consists of miscellaneous stipulations concerning the duration of the treaty, its ratification, the accession of third Powers, and the like. The last part comprises the signatures of the representatives. But this order is by no means necessary. Sometimes, for instance, the treaty itself does not contain the very stipulations upon which the contracting parties have agreed, such stipulations being placed in an annex to the treaty. It may also happen that a treaty contains secret stipula-

¹ See Moore, v. § 752, and, in particular, Crandall, *op. cit.*, §§ 56-61. As regards the assertion that only such compacts require ratification as bear the title *treaties* or

conventions, see below, § 512.

² See Oakes and Mowat, *The Great European Treaties of the Nineteenth Century* (1918), p. 1 n.

tions in an additional part, which are not made public with the bulk of the stipulations.¹

V

RATIFICATION OF TREATIES

Grotius, ii. c. 11, § 12—Pufendorf, iii. c. 9, § 2—Vattel, ii. § 156—Hall, § 110—Westlake, i. pp. 290-292—Lawrence, § 132—Phillimore, ii. § 52—Twiss, i. § 214—Halleck, i. pp. 296-297—Taylor, §§ 364-367—Moore, v. §§ 743-756—Walker, § 30—Wharton, ii. §§ 131-131a—Hershey, No. 298—Wheaton, §§ 256-263—Bluntschli, §§ 420-421—Heffter, § 87—Gessner in *Holtzendorff*, iii. pp. 15-18—Ullmann, § 78—Bonfils, Nos. 824-831—Pradier-Fodéré, ii. Nos. 1100-1119—Mérignhac, ii. pp. 652-666—Nys, ii. pp. 507-515—Rivier, ii. § 50—Calvo, iii. §§ 1627-1636—Fiore, ii. No. 994, and *Code*, No. 755—Martens, i. §§ 105-108—Wicquefort, *L'Ambassadeur et ses Fonctions* (1680), ii. § xv.—Jellinek, *Die rechtliche Natur der Staatenverträge* (1880), pp. 53-56—Nippold, *op. cit.*, pp. 123-125—Wegmann, *Die Ratifikation von Staatsverträgen* (1892)—Crandall, *op. cit.*, § 3—Satow, *Diplomatic Practice*, ii. §§ 606-612.

§ 510. Ratification is the term for the final confirmation given by the parties to an international treaty concluded by their representatives. Although a treaty is concluded as soon as the mutual consent is manifest from acts of the duly authorised representatives, its binding force is, as a rule, suspended till ratification is given. The function of ratification is, therefore, to make the treaty binding ; and, if it is refused, the treaty falls to the ground in consequence. As long as ratification is not given, the treaty is, although concluded, not perfect. Many writers ² maintain that, as a treaty is not binding without ratification, it is the latter which really contains the mutual consent, and really concludes the treaty. Before ratification, they maintain, no treaty has been concluded, but a mere mutual proposal to conclude a treaty has been agreed to. But this

Conception and Function of Ratification.

¹ The matter is treated with all details by Pradier-Fodéré, ii. §§ 1086-1099.

² See, for instance, Ullmann, § 78 ;

Jellinek, *op. cit.*, p. 55 ; Nippold, *op. cit.*, p. 123 ; Wegmann, *op. cit.*, p. 11.

quickly as possible. But it must be emphasised that renunciation of ratification is valid only if given by representatives duly authorised to make such renunciation. If the representatives have not received a special authorisation to dispense with ratification, their renunciation is not binding upon the States which they represent.

It is asserted that 'apart from those compacts which bear the title *treaty* or *convention*, ratification is only required where it is provided for';¹ but this assertion is too sweeping. Since *all* international compacts are contracts, and therefore treaties in the wider sense of the term, the title which a particular compact bears cannot decide the question as to whether it does, or does not, require ratification. The decision rather depends upon the contents of the compact. Thus a protocol, or an exchange of notes, which merely add some minor point, or record agreement on the interpretation of a clause in a treaty, do not require ratification, unless this is specially stipulated. The same is valid for agreements providing for a *modus vivendi* and the like, whatever title they may bear. Further, there is no doubt that matters of minor importance are frequently agreed upon by an exchange of notes, or in so-called protocols, arrangements, declarations, and the like, which are not considered to be subject to ratification, because the agreements therein contained are at once carried out. But apart from these obvious exceptions, all compacts require ratification, whatever title the document comprising them may bear.

Length of
Time for
Ratifica-
tion.

§ 513. No rule of International Law prescribes the length of time within which ratification must be given, or refused. If this is not specially stipulated by the contracting parties in the treaty itself, a reasonable length of time must be presumed to be mutually granted.

¹ See Satow, *op. cit.*, ii. § 606, p. 276.

Without doubt, a refusal to ratify must be presumed from the lapse of an unreasonable time without ratification having been made. In most cases, however, treaties which are in need of ratification now contain a clause stipulating that they are subject to ratification, and also prescribing the time within which ratification should take place. .

§ 514. The question now requires attention whether ratification can be refused on just grounds only, or according to discretion. Formerly ¹ it was maintained that ratification could not be refused unless the representatives had exceeded their powers, or violated their secret instructions. But nowadays there is probably no publicist who maintains that a State is in *any* case *legally* ² bound to accord ratification. Yet many insist that a State is, except for just reasons, in principle *morally* bound not to refuse ratification. I cannot see, however, the value of such a moral, in contradistinction to a legal, duty. The fact upon which everybody agrees is that International Law does in no case impose a duty of ratification upon a contracting party. A State refusing ratification will always have reasons for doing so which appear just to itself, although they may be unjust in the eyes of others. In practice, ratification is given, or withheld, at discretion. But in the majority of cases, of course, ratification is not refused. A State which often, and apparently wantonly, refused to ratify treaties would lose all credit in international negotiations, and would soon feel the consequences. On the other hand, it is impossible to lay

Refusal of
Ratifica-
tion.

¹ See Grotius, ii. c. 11, § 12; Bynkershoek, *Quaestiones juris publici*, ii. 7; Wicquefort, *L'Ambassadeur*, ii. 15; Vattel, ii. § 156; G. F. von Martens, § 48.

² This must be maintained in spite of Wegmann's assertion (*op. cit.*, p. 32) that a customary rule of the Law of Nations has to be recognised that

ratification cannot regularly be refused. The hair-splitting scholasticism of this writer is illustrated by a comparison between his customary rule for the non-refusal of ratification, as arbitrarily constructed by himself, and the opinion which he (p. 11) emphatically defends that a treaty is concluded only by ratification.

down hard and fast rules respecting just and unjust causes for refusing ratification. The interests at stake are so various, and the circumstances which must influence a State are so imponderable, that it must be left to the discretion of every State to decide the question for itself. Numerous examples of important treaties which have not found ratification can be given. It suffices to mention the Hay-Pauncefote Treaty between the United States and Great Britain regarding the proposed Nicaragua Canal, signed on February 5, 1900, which was modified by the Senate of the United States in consenting to its ratification, this being equivalent to refusal of ratification. (See below, § 517.)

Form of
Ratifica-
tion.

§ 515. No rule of International Law exists which prescribes a necessary form of ratification. Ratification can, therefore, be given tacitly as well as expressly. Tacit ratification takes place when a State begins the execution of a treaty without expressly ratifying it. Further, ratification may be given orally or in writing, although I am not aware of any case in which ratification was given orally. For it is usual for ratification to take the form of a document duly signed by the heads of the States concerned, and their Secretaries for Foreign Affairs. It is usual to draft as many documents as there are parties to the convention, and to exchange these documents between the parties. Sometimes the whole of the treaty is recited *verbatim* in the ratifying documents, but sometimes only the title, preamble, and date of the treaty, and the names of the signatory representatives are cited. As ratification is only the necessary confirmation of an already existing treaty, the essential requirement in a ratifying document is merely that it should refer clearly and unmistakably to the treaty to be ratified. The citation of title, preamble, date, and names of the representatives is, therefore, quite sufficient to satisfy that requirement,

and I cannot agree with those writers who maintain that the whole of the treaty ought to be recited *verbatim*.

§ 516. Ratification is effected by those organs which exercise the treaty-making power of the States. These organs are regularly the heads of the States or their Governments,¹ but they can, according to the Municipal Law of some States, delegate the power of ratification for some parts of their territory to other representatives. Thus, the Viceroy of India is empowered to ratify treaties with certain Asiatic monarchs in the name of the King of Great Britain and Emperor of India.

Ratification, by whom effected.

In case the head of a State ratifies a treaty, although the necessary constitutional requirements have not been previously fulfilled (as, for instance, where a treaty has not received the necessary approval from the Parliament of the said State), the question arises whether such ratification is valid, or null and void. Many writers² maintain that it is nevertheless valid. But this opinion is not correct, because it is clearly evident that, in such a case, the head of the State has exceeded his powers, and that, therefore, the State concerned cannot be held to be bound by the treaty.³ The conflict between the United States and France in 1831, frequently quoted in support of the opinion that such ratification is valid, is not in point. It is true that the United States insisted on payment of the indemnity stipulated by a treaty which had been ratified by the King of France without having received the necessary approval of the French Parliament. But the United States did not maintain that the ratification was valid; she insisted upon payment, because the French Government had admitted that such indemnity was due to her.⁴

¹ See above, § 495.

² See, for instance, Martens, i. p. 147.

§ 107, and Rivier, ii. p. 85.

³ See above, § 497, and Nippold,

p. 147.

⁴ See Wharton, ii. § 131a, p. 20.

Ratification cannot be Partial and Conditional.

§ 517. It follows from the nature of ratification, as a necessary confirmation of a treaty already concluded, that ratification must be either given or refused, no conditional or partial ratification being possible. That occasionally a State tries to modify a treaty in ratifying cannot be denied; but conditional ratification is no ratification at all, but equivalent to refusal of ratification. Nothing, of course, prevents the other contracting party from entering into fresh negotiations in regard to such modifications; but it must be emphasised that such negotiations are negotiations for a new treaty,¹ the old treaty having become null and void through its conditional ratification. On the other hand, no obligation exists for such party to enter into fresh negotiations, it being a fact that conditional ratification is identical with refusal of ratification, whereby the treaty falls to the ground. Thus, for instance, when the Senate of the United States on December 20, 1900, in consenting² to the ratification of the Hay-Pauncefote Treaty, added amendments which modified it, Great Britain did not accept the amendments, and considered the treaty to have fallen to the ground.

Quite particular is the case of a treaty to which a greater number of States are parties, and which is only partially ratified by one of the contracting parties. Thus France, in ratifying the General Act of the Brussels Anti-Slavery Conference of July 2, 1890,³ excepted

¹ This is the correct explanation of the practice on the part of States, which sometimes prevails, of acquiescing, after some hesitation, in alterations proposed by a party to a treaty in ratifying it; see examples in Pradier-Fodéré, ii. No. 1104, and Calvo, iii. § 1630.

² It is of importance to emphasise that the Senate of the United States, in proposing an amendment to a treaty before its ratification, does not, strictly speaking, ratify such treaty conditionally, since it is the

President, and not the Senate, who possesses the power of granting or refusing ratification; see Willoughby, *The Constitutional Law of the United States* (1910), i. p. 462, n. 14. The President, however, according to Article 2 of the Constitution, cannot grant ratification without the consent of the Senate, and so the proposal of an amendment to a treaty on the part of the Senate amounts to a proposal of a new treaty.

³ Which is no longer in force, see below, § 566.

from ratification Articles 21 to 23 and 42 to 61, and the Powers acquiesced in this partial ratification, so that France was not bound by these twenty-three articles.¹

But it must be emphasised that ratification is only partial and conditional if one or more stipulations of the treaty which have been signed without reservation are exempted from ratification, or if an amending clause is added to the treaty during the process of ratification. It is therefore quite legitimate for a party who, in signing a treaty, made reservations against certain articles² to except those articles from ratification, and it would be incorrect to speak in this case of partial ratification.

Again, it is quite legitimate—and one ought not in this case to speak of conditional ratification—for a contracting party, who wants to secure a certain interpretation for certain terms and clauses of a treaty, to grant ratification upon the understanding only that they should bear a particular interpretation. Thus when, in 1911, opposition arose in Great Britain to the ratification of the Declaration of London on account of the fact that the meaning of certain terms was ambiguous, and that the wording of certain clauses did not agree with the interpretation given to them by the Report of the Drafting Committee, the British Government declared that they would only ratify upon the understanding that the interpretation contained in the Report should be considered as binding, and that the ambiguous terms concerned should bear that interpretation.³ In such cases ratification does not introduce an amendment or an alteration, but only fixes the meaning of otherwise doubtful terms and clauses of a treaty.

¹ See Martens, *N.R.G.*, 2nd Ser. xxii. p. 260.

² See below, § 519.

³ In fact, the Declaration has not been ratified at all.

Effect of
Ratifica-
tion.

§ 518. The effect of ratification by the parties is to make a treaty binding. If one party executes an instrument of ratification, and the other does not, the treaty falls to the ground. But the question arises whether the effect of ratification is retroactive, so as to make a treaty binding from the date when it was duly signed by the representatives. No unanimity exists among publicists as regards this question. As in all important cases treaties themselves stipulate the date from which they are to take effect, the question is chiefly of theoretical interest. The fact that ratification imparts the binding force to a treaty seems to indicate that ratification has regularly no retroactive effect. Different, however, is, of course, the case in which the contrary is expressly stipulated in the treaty itself, and, again, the case where a treaty contains stipulations to be executed at once, without waiting for the necessary ratification. Be this as it may, ratification makes a treaty binding only if the original consent was not given in error, or under a delusion.¹ If, however, the ratifying State, having discovered such error or delusion, ratifies the treaty nevertheless, such ratification makes the treaty binding. And the same is valid as regards a ratification given to a treaty, although the ratifying State knows that its representatives have exceeded their powers by concluding the treaty.

VI

EFFECT OF TREATIES

Hall, § 114—Lawrence, § 134—Halleck, i. pp. 299-302—Taylor, §§ 370-373—Wharton, ii. § 137—Wheaton, § 266—Bluntschli, §§ 415-416—Hartmann, § 49—Heffter, § 94—Bonfils, Nos. 845-850²—Despagnet, Nos. 447-448—Pradier-Fodéré, ii. Nos. 1151-1155—Mérignhac, ii. pp. 667-672—Rivier, ii. pp. 119-122—Calvo, iii. §§ 1643-1648—Fiore, ii. Nos. 1008-

¹ See above, § 500.

1009, and *Code*, Nos. 773-783—Martens, i. §§ 65 and 114—Nippold, *op. cit.*, pp. 151-160—Wright in *A.J.*, x. (1916), pp. 706-736, and xi. (1917), pp. 566-577—Crandall, *op. cit.*, §§ 155-159—Roxburgh, *International Conventions and Third States* (1917).

§ 519. By a treaty the contracting parties in the first place are concerned. The effect of the treaty upon them is that they are bound by its stipulations, and that they must execute it in all its parts. No distinction should be made between more and less important parts of a treaty as regards its execution. Whatever may be the importance or the insignificance of a part of a treaty, it must be executed in good faith, for the binding force of a treaty covers all its parts and stipulations equally. If, however, a party to a treaty concluded between more than two parties signs it with a reservation as regards certain articles, such party is not bound by these articles, although it ratifies¹ the treaty.

Effect of
Treaties
upon Con-
tracting
Parties.

§ 520. It must be specially observed that the binding force of a treaty concerns the contracting States only, and not their subjects. As International Law is a law between States only and exclusively, treaties can have effect upon, and can bind, States only and exclusively. If treaties contain stipulations with regard to rights and duties of the subjects of the contracting States,² their courts, officials, and the like, these States have to take such steps as are necessary, according to their Municipal Law, to make these stipulations binding upon their subjects, courts, officials, and the like. It may be that, according to the Municipal Laws of some countries, the official publication of a treaty concluded by the Government is sufficient for this purpose, but in other countries other steps are necessary, such as, for example, special statutes to be passed by the respective Parliaments.³

Effect of
Treaties
upon the
Subjects
of the
Parties.

¹ See above, § 517.

² See above, § 289.

³ The distinction between Inter-

national and Municipal Law as discussed above, §§ 20-25, is the basis from which the question must

Effect of
Changes
in Gov-
ernment
upon
Treaties.

§ 521. As treaties are binding upon the contracting States, changes in the Government, or even in the form of government, of one of the parties can, as a rule, have no influence whatever upon the binding force of treaties. Thus, for instance, a treaty of alliance concluded by a State with a constitutional government remains valid, although the ministry may change. And no head of a State can shirk the obligations of a treaty concluded by his State under the government of his predecessor. Even when a monarchy turns into a republic, or *vice versa*, treaty obligations regularly remain the same. For all such changes and alterations, important as they may be, do not alter the person of the State which concluded the treaty. If, however, a treaty stipulation essentially presupposes a certain form of government, then a change from such form makes such stipulation void, because its execution has become impossible.¹

Effect of
Treaties
upon
Third
States.

§ 522. According to the principle *pacta tertiis nec nocent nec prosunt*, a treaty concerns the contracting States only; neither rights nor duties, as a rule, arise under a treaty for third States which are not parties to the treaty. But sometimes treaties have indeed an effect upon third States.² Such an effect is always produced when a treaty touches previous treaty rights of third States. Thus, for instance, a commercial treaty conceding more favourable conditions than hitherto have been conceded by the parties thereto has an effect upon all such third States as have previously concluded commercial treaties containing the so-called *most-*

be decided whether international treaties have a direct effect upon the officials and subjects of the contracting parties. The matter is treated in detail by Wright in *A.J.*, x. (1916), pp. 706-736.

¹ See below, § 542. Not to be confounded with the effect of changes in government is the effect of a change in international status upon treaties, as, for instance, if a hitherto

full sovereign State becomes half or part sovereign, or *vice versa*, or if a State merges entirely into another, and the like. This is a case of succession of States which has been discussed above, §§ 82-84; see also below, § 548.

² The matter is exhaustively discussed by Roxburgh, *International Conventions and Third States* (1917).

*favoured-nation clause*¹ with one of the contracting parties.

The question arises whether, in exceptional cases, third States can acquire rights (and become subject to the duties connected therewith) by giving their express or implicit consent to the stipulations of such treaties as were specially concluded for the purpose of creating such rights, not only for the contracting parties, but also for third States. Thus, the Hay-Pauncefote Treaty between Great Britain and the United States of 1901, and the Hay-Varilla Treaty between the United States and Panama of 1903, stipulate that the Panama Canal shall be open to vessels of commerce and of war of all nations, although Great Britain, the United States, and Panama only are parties.² Thus, further, Article 5 of the Boundary Treaty of Buenos Ayres of September 15, 1881, stipulates that the Straits of Magellan shall be open to vessels of all nations, although Argentina and Chili only are parties. Again, the Convention of Paris, signed on March 30, 1856, and annexed to the Peace Treaty of Paris of 1856, stipulated that Russia should not fortify the Aland³ Islands; although this stipulation was made in the interest of Sweden, only Great Britain, France, and Russia were parties. I believe that the question must be answered in the negative, and nothing prevents the contracting parties from altering such a treaty without the consent of third States, provided the latter have not in the meantime customarily acquired such rights through the unanimous implicit consent of all concerned.

It has been asserted,⁴ that if a treaty stipulates a right for third States, and they make use of such a right, they thereby acquire a legal right for themselves, so that the

¹ See below, § 580, but note the American interpretation of this clause.

² See above, § 184.

³ See above, § 205, p. 368, n. 3.

⁴ Diena in *Z.I.*, xxv. (1915), pp. 14-22.

treaty could not be abrogated without their consent. It is argued that, having accepted a right which was offered to them, they could not be deprived of it against their will. There is no doubt that this line of argument would be correct, if the contracting parties really intended to offer such a right to third States. But it may well be doubted whether such is always their intention. It may be said that, if the contracting parties had intended to do so, they would have embodied a stipulation in the treaty, according to which the third parties concerned could *accede* to it.¹

It must be emphasised that a treaty between two States can never invalidate a stipulation in a treaty between one of the contracting parties and a third State, unless the latter expressly consents. If, for instance, two States have entered into an alliance, and one of them afterwards concludes a treaty with a third State, according to which all conflicts without exception shall be settled by arbitration, the previous treaty of alliance remains valid, even in the case of war breaking out between the third State and the other party to the alliance.² Therefore, when in 1911 Great Britain contemplated entering into a treaty of general arbitration with the United States of America, according to which all differences should be decided by arbitration, she notified Japan of her intention, on account of the existing treaty of alliance, and Japan consented to substitute for the old treaty a new treaty of alliance,³ Article 4 of which stipulates that the alliance shall never concern a war with a third Power with whom one of the allies may have concluded a treaty of general arbitration.⁴

¹ The case of treaties intended to make an 'international settlement' (see Roxburgh, *op. cit.*, pp. 51-60) would seem to be a case of unanimous implicit consent.

² See below, § 573.

³ See below, § 569.

⁴ Another example is the Bryan-Chamorro Treaty of August 5, 1914, between the United States of America and Nicaragua, against which Costa Rica, San Salvador, and Honduras protested. See above, § 135 (2).

VII

MEANS OF SECURING PERFORMANCE OF TREATIES

Vattel, ii. §§ 235-261—Hall, § 115—Lawrence, § 134—Phillimore, ii. §§ 54-63a—Bluntschli, §§ 425-441—Heffter, §§ 96-97—Geffcken in *Holtzendorff*, iii. pp. 85-90—Ullmann, § 83—Bonfils, Nos. 838-844—Despagnet, Nos. 451-452—Pradier-Fodéré, ii. Nos. 1156-1169—Rivier, ii. pp. 94-97—Nys, ii. pp. 516-520—Calvo, iii. §§ 1638-1642—Fiore, ii. Nos. 1018-1019, and *Code*, Nos. 789-796—Martens, i. § 115—Nippold, *op. cit.*, pp. 212-227—Crandall, *op. cit.*, § 7—Idman, *Le Traité de Garantie* (1913), pp. 10-40.

§ 523. As there is no international institution which could enforce the performance of treaties, and as history teaches that treaties have frequently been broken, various means of securing their performance have been made use of. The more important of these means are oaths, hostages, pledges, occupation of territory, guarantee.

What Means have been in Use.

§ 524. Oaths are a very old means of securing the performance of treaties, which was constantly made use of, not only in antiquity and the Middle Ages, but also in modern times. For in the sixteenth and seventeenth centuries, all important treaties were still secured by oaths. During the eighteenth century, however, the custom gradually died out, the last example being the treaty of alliance between France and Switzerland in 1777, which was solemnly confirmed by the oaths of both parties in the cathedral at Solothurn. The employment of oaths for securing treaties was of great value in the times of absolutism, when little difference used to be made between the State and its monarch. The more the distinction grew into existence between the State as the subject of International Law on the one hand, and the monarch as the temporary chief organ of the State on the other hand, the more such oaths fell into disuse. For an oath can exercise its

Oaths.

force on the individual only who takes it, and not on the State for which it is taken.

Hostages. § 525. Hostages are as old a means of securing treaties as oaths, but they have likewise, for ordinary purposes¹ at least, become obsolete, because they have practically no value at all. The last case of a treaty secured by hostages is the Peace of Aix-la-Chapelle in 1748, in which hostages were stipulated to be sent by England to France for the purpose of securing the restitution of Cape Breton Island to the latter. The hostages sent were Lord Sussex and Lord Cathcart, who remained in France till July 1749.

Pledge. § 526. The pledging of movable property by one of the contracting parties to the other for the purpose of securing the performance of a treaty is possible, but has not frequently occurred. Thus, Poland is said to have pledged her crown jewels once to Prussia.² The pledging of movables is nowadays quite obsolete, although it might on occasion be revived.

Occupation of Territory. § 527. Occupation of territory, such as a fort or even a whole province, as a means of securing the performance of a treaty, has frequently been made use of with regard to the payment of large sums of money due to a State under a treaty. Nowadays such occupation is only resorted to in connection with treaties of peace stipulating the payment of a war indemnity. Thus, the preliminary peace treaty of Versailles in 1871 stipulated that Germany should have the right to keep certain parts of France under military occupation until the final payment of the war indemnity of five milliards of francs.

Again, the Treaty of Peace with Germany provides that 'as a guarantee for the execution of the present

¹ Concerning hostages nowadays taken in time of war, see below, vol. ii. §§ 258-259.

² See Vattel, ii. § 241, and Phillimore, ii. § 55.

treaty by Germany, the German territory situated to the west of the Rhine, together with the bridgeheads, will be occupied by Allied and Associated troops for a period of fifteen years from the coming into force of the present treaty.' ¹

§ 528. The best means of securing treaties, and one which is still in use generally, is the guarantee of other States not directly affected by them. Such a guarantee is a kind of accession ² to the guaranteed treaty, and is a treaty in itself—namely, the promise of the guarantor, should occasion arise, to do what is in his power to compel the contracting party or parties to execute the treaty. ³ Guarantee of a treaty is only one species of guarantee in general, which will be discussed below, §§ 574-576a. Guarantee.

VIII

PARTICIPATION OF THIRD STATES IN TREATIES

Hall, § 114—Wheaton, § 288—Hartmann, § 51—Heffter, § 88—Ullmann, § 81—Bonfils, Nos. 832-834—Despagnet, No. 448—Pradier-Fodéré, ii. Nos. 1127-1150—Rivier, ii. pp. 89-93—Calvo, iii. §§ 1621-1626—Fiore, ii. Nos. 1025-1031—Martens, i. § 111.

§ 529. Ordinarily a treaty creates rights and duties between the contracting parties exclusively. Nevertheless, third States may be interested in such treaties, for the common interests of the members of the Family of Nations are so interlaced, that few treaties between single members can be concluded, in which third States have not some kind of interest. But such an interest, all-important as it may be, must not be confounded with Interest and Participation to be distinguished.

¹ Article 428.

² See below, § 532.

³ Nippold (p. 226) proposes that a universal treaty of guarantee should be concluded between all the mem-

bers of the Family of Nations guaranteeing, for the present and the future, all international treaties. I do not believe that this well-meant proposal is feasible.

participation of third States in treaties. Such participation can occur in five different forms—namely, good offices, mediation, intervention, accession, and adhesion.¹

Good
Offices
and
Media-
tion.

§ 530. A treaty may be concluded with the help of the good offices, or through the mediation, of a third State, whether these offices be asked for by the contracting parties, or be exercised spontaneously by a third State. Such third State, however, does not necessarily, either through good offices or through mediation, become a real party to the treaty, although this might be the case. A great many of the most important treaties owe their existence to the good offices or mediation of third Powers.²

Interven-
tion.

§ 531. A third State may participate in a treaty in such a way that it interposes dictatorially between two States negotiating a treaty, and requests them to drop, or to insert, certain stipulations. Such intervention does not necessarily make the interfering State a real party to the treaty. Instances of threatened intervention of such a kind are the protest of Great Britain against the preliminary peace treaty concluded in 1878 at San Stefano³ between Russia and Turkey, and that of Russia, Germany, and France in 1895 against the peace treaty of Shimonoseki⁴ between Japan and China.

Accession.

§ 532. Of accession there are two kinds. Accession means, in the first place, the formal entrance of a third State into an existing treaty, so that it becomes a party to the treaty, with all rights and duties arising therefrom. Such accession can take place only with

¹ That certain treaties concluded by the suzerain are *ipso facto* concluded for the vassal State does not make the latter participate in such treaties. Nor is it correct to speak of participation of a third State in a treaty when a State becomes party to a treaty through the fact that it has given a mandate to another State

to contract on its behalf.

² The difference between good offices and mediation will be discussed below, vol. ii. § 9.

³ See above, § 135 (2).

⁴ See *R. G.*, ii. (1895), pp. 457-463. Details concerning intervention have been given above, §§ 134-138; see also below, vol. ii. § 50.

the consent of the original contracting parties; it always constitutes a treaty of itself. Very often the contracting parties stipulate expressly that the treaty shall be open to the accession of a certain State. And the so-called law-making treaties, as the Declaration of Paris or the Geneva Convention for example, regularly stipulate that all such States as have not been originally contracting parties, shall have an opportunity of acceding.

But there is, secondly, another kind of accession. For a State may enter into a treaty between other States for the purpose of guarantee.¹ This kind of accession makes the acceding State also a party to the treaty; but the rights and duties of the acceding State are different from the rights and duties of the other parties, for the former is a guarantor only, whereas the latter are directly affected by the treaty.

§ 533. Adhesion is defined as such entrance of a third Adhesion. State into an existing treaty as takes place, either with regard only to a part of the stipulations, or with regard only to certain principles laid down in the treaty. Whereas through accession a third State becomes a party to the treaty, with all the rights and duties arising from it, through adhesion a third State becomes a party only to such parts or principles of the treaty as it has adhered to. But it must be specially observed that the distinction between accession and adhesion is one made in theory, to which practice frequently does not correspond. Often treaties speak of accession of third States where in fact adhesion only is meant, and *vice versa*. Thus, Article 6 of the Hague Convention with respect to the laws and customs of war on land stipulates the possibility of future *adhésion* of non-signatory Powers, although accession is meant.²

¹ See above, § 528.

² Although the French text uses

the term '*adhésion*,' the official English version speaks of 'accession.'

IX

EXPIRATION AND DISSOLUTION OF TREATIES

Vattel, ii. §§ 198-205—Hall, § 116—Westlake, i. pp. 295-297—Lawrence, § 134—Halleck, i. pp. 314-316—Taylor, §§ 394-399—Wharton, ii. § 137a—Wheaton, § 275—Moore, v. §§ 770-778—Bluntschli, §§ 450-461—Heffter, § 99—Ullmann, § 85—Bonfils, Nos. 855-860—Despagnet, Nos. 453-455—Pradier-Fodéré, ii. Nos. 1200-1218—Mérignhac, ii. p. 788—Rivier, ii. § 55—Nys, ii. pp. 531-535—Calvo, iii. §§ 1662-1668—Fiore, ii. Nos. 1047-1052—Martens, i. § 117—Jellinek, *Die rechtliche Natur der Staatenverträge* (1880), pp. 62-64—Nippold, *op. cit.*, pp. 235-248—Olivi, *Sull' Estinzione dei Trattati internazionali* (1883)—Schmidt, *Ueber die völkerrechtliche Clausula Rebus sic stantibus*, etc. (1907)—Kaufmann, *Das Wesen des Völkerrechts und die Clausula Rebus sic stantibus* (1911)—Bonucci in *Z. V.*, iv. (1910), pp. 449-471—Crandall, *op. cit.*, §§ 178-186—Lammasch, *Das Völkerrecht nach dem Kriege* (1917), pp. 130-171.

Expira-
tion and
Dissolu-
tion in
contra-
distinc-
tion to
Fulfil-
ment.

§ 534. The binding force of treaties may terminate in four different ways, because a treaty may either expire, or be dissolved, or become void, or be cancelled.¹ The grounds of expiration of treaties are, first, expiration of the time for which a treaty was concluded, and, secondly, occurrence of a resolute condition. Of grounds of dissolution of treaties there are three—namely, mutual consent, withdrawal by notice, and vital change of circumstances. In contradistinction to expiration, dissolution, voidance, and cancellation, performance of treaties does not terminate their binding force. A treaty whose obligation has been performed is as valid as before, although it is then of historical interest only.

Expira-
tion
through
Expira-
tion of
Time.

§ 535. All such treaties as are concluded for a certain period of time only, expire with the expiration of such time, unless they are renewed, or prolonged for another period. Such time-expiring treaties are frequently

¹ The distinction made in the text between fulfilment, expiration, dissolution, voidance, and cancellation of treaties is, as far as I know, nowhere sharply drawn, although it

would seem to be of considerable importance. Voidance and cancellation will be discussed below, §§ 540-544 and 545-549.

concluded, and no notice is necessary for their expiration, except when specially stipulated.

A treaty, however, may be concluded for a certain period of time only, but with an additional stipulation that the treaty shall, after the lapse of such period, be valid for another period, unless one of the contracting parties gives notice in due time.

§ 536. Different from time-expiring treaties are such as are concluded under a resolute condition, which means under the condition that they shall at once expire with the occurrence of certain circumstances. As soon as these circumstances arise, the treaties expire.

Expiration
through
Resolute
Condition.

§ 537. A treaty, although concluded for ever, or for a period of time which has not yet expired, may nevertheless always be dissolved by mutual consent of the contracting parties. Such mutual consent can become apparent in three different ways.

Mutual
Consent.

First, the parties can expressly and purposely declare that a treaty shall be dissolved; this is rescission. Or, secondly, they can conclude a new treaty concerning the same objects as those of a former treaty, without any reference to the latter, although the two treaties are inconsistent with each other. This is substitution, and in such a case it is obvious that the treaty previously concluded was dissolved by tacit mutual consent. Or, thirdly, if the treaty is one that imposes obligations upon one of the contracting parties only, the other party can renounce its rights. Dissolution by renunciation is a case of dissolution by mutual consent, since acceptance of the renunciation is necessary.

§ 538. Treaties, provided they are not such as are concluded for ever, may also be dissolved by withdrawal, after notice by one of the parties. Many treaties stipulate expressly the possibility of such withdrawal, and as a rule contain details in regard to form, and period, in which notice is to be given

With-
drawal by
Notice.

for the purpose of withdrawal. But there are other treaties which, although they do not expressly stipulate the possibility of withdrawal, can nevertheless be dissolved after notice by one of the contracting parties. To that class belong all such treaties as are either not expressly concluded for ever, or apparently not intended to set up an everlasting condition of things. Thus, for instance, a commercial treaty, or a treaty of alliance not concluded for a fixed period only, can always be dissolved after notice, although such notice be not expressly stipulated. Treaties, however, which are apparently intended, or expressly concluded, for the purpose of setting up an everlasting condition of things, and, further, treaties concluded for a certain period of time only, are as a rule not notifiable, although they can be dissolved by mutual consent of the contracting parties.

It must be emphasised that all treaties of peace, and all boundary treaties, belong to this class. It cannot be denied that history records many cases in which treaties of peace have not established an everlasting condition of things, since one, or both, of the contracting States took up arms again, as soon as they recovered from the exhausting effect of the previous war. But this does not prove either that such treaties can be dissolved through giving notice, or that, at any rate as far as International Law is concerned, they are not intended to create an everlasting condition of things.

Vital
Change of
Circum-
stances.

§ 539. Although, as just stated, treaties concluded for a certain period of time, and such treaties as are apparently intended or expressly contracted for the purpose of setting up an everlasting condition of things, cannot, in principle, be dissolved by withdrawal of one of the parties, there is an exception to this rule. For it is an almost universally recognised fact that vital changes of circumstances may be of such a kind as to

justify a party in demanding to be released from the obligations of an unnotifiable treaty.¹ The vast majority of publicists, as well as the Governments of the civilised States, defend the principle² *conventio omnis intelligitur rebus sic stantibus*, and they agree,³ therefore, that all treaties are concluded under the tacit condition *rebus sic stantibus*.⁴ That this condition involves a large amount of danger cannot be denied, for it can be, and indeed frequently has been, abused for the purpose of hiding the violation of treaties behind the shield of law, and of covering shameful wrong with the mantle of righteousness. But all this cannot alter the fact that this exceptional condition is as necessary for International Law and international intercourse as the very rule *pacta sunt servanda*. When the existence, or the vital development, of a State stands in unavoidable conflict with its treaty obligations, the latter must

¹ Such a demand can, of course, only be made with regard to executory treaties. Executed treaties are beyond the reach of such a demand.

² The principle dates back to the *glossatores*, and has found entrance into the doctrine of International Law by way of the doctrine of Municipal Law. See Pfaff, *Die Klausel Rebus sic stantibus in der Doktrin und der oesterreichischen Gesetzgebung* (1898); Bindewald, *Rechtsgeschichtliche Darstellung der Klausel Rebus sic stantibus und ihre Stellung im Bürgerlichen Gesetzbuch* (1901); Kaufmann, *Die Klausel Rebus sic stantibus* (1907).

³ See Bonucci in *Z.V.*, iv. (1910), pp. 449-471. Many writers agree to it with great reluctance only, and in a very limited sense, as, for instance, Grotius, ii. c. 16, § 25, No. 2; Vattel, ii. § 296; Klüber, § 165. Some few writers, however, disagree altogether, as, for instance, Bynkershoek, *Quaest. Jur. public.*, ii. c. 10, and Wildman, *Institutes of International Law*, i. (1849), p. 175. Schmidt, *op. cit.*, pp. 26-92, would seem to reject the *clausula* altogether, yet—see pp. 93-151—can

nevertheless not help recognising it in the end, although not as a rule of law, but as a morally justifiable rule of policy. A good survey of the practice of the States in the matter during the nineteenth century is given by Kaufmann, *op. cit.*, pp. 12-37. See also Foster, *The Practice of Diplomacy* (1906), pp. 299-305. Very peculiar is the attitude of Lammasch in *Das Völkerrecht nach dem Kriege* (1917); whereas he uses every possible argument on pp. 142-158 to prove that the *clausula* is not, and has never been, a recognised rule of customary International Law, he attempts to prove on pp. 159-171 that treaties of alliance and guarantee are not binding, or, at any rate, are concluded according to the principle, *rebus sic stantibus* (p. 170).

⁴ The application of the principle, *rebus sic stantibus*, to treaties is recognised in a decision of the Supreme Court of Switzerland; see *Entscheidungen des Schweizer Bundesgerichts*, viii. (1882), p. 57. The case is quoted by Kaufmann, *op. cit.*, p. 58.

give way, for self-preservation and development, in accordance with the growth and the vital requirements of the nation, are the primary duties of every State. No State would consent to any such treaty as would hinder it in the fulfilment of these primary duties. The consent of a State to a treaty presupposes a conviction that it is not fraught with danger to its existence and vital development. For this reason every treaty implies a condition that, if by an unforeseen change of circumstances an obligation stipulated in the treaty should imperil the existence or vital development of one of the parties, it should have a right to demand to be released from the obligation concerned.

This influence of a vital change of circumstances and conditions upon the validity of treaties is no isolated phenomenon, for vital changes of circumstances and conditions play a great part with regard to the validity of all law. Circumstances alter, not only cases, but also the law, as the development of Common Law and Equity shows no less than that of International Law. Why should a vital change of circumstances not have an influence upon treaty obligations, if it has such force as to change even the law itself ?

The great danger of the clause, *rebus sic stantibus*, is to be found in the elastic meaning of the term 'vital change of circumstances,' since, in the absence of an international court to which an appeal could be made, a State will in each particular case judge for itself whether or not there is a vital change of circumstances justifying its demand to be released from a treaty obligation. As long as there is no international court in existence, which, on the motion of one of the contracting parties, could set aside a treaty obligation the execution of which had become so oppressive that the party under the obligation might in justice ask to be released, there remains the great danger that the clause,

rebus sic stantibus, will be abused, for the purpose of hiding the violation of treaties behind the shield of law. On the other hand, the danger is somewhat counterbalanced by the fact that frequent resort to the clause without justification by any State would certainly destroy all its credit among the nations.

Be that as it may, it is generally agreed that the clause, *rebus sic stantibus*, may only be resorted to in very exceptional circumstances, and that certainly not every change of circumstances justifies a State in making use of it. All agree that, although treaty obligations may, through a change of circumstances, become disagreeable, burdensome, and onerous, they must nevertheless be discharged. All agree, further, that a change of government, and even a change in the form of a State, such as the turning of a monarchy into a republic and *vice versa*, does not alone, and in itself, justify a State in resorting to the clause. On the other hand, all agree in regard to many cases in which it could justly be made use of. Thus, for example, if a State enters into a treaty of alliance for a certain period of time, and if, before the expiration of the alliance, a change of circumstances occurs, so that now the alliance endangers the very existence of one of the contracting parties, all will agree that the clause, *rebus sic stantibus*, would justify that party in demanding to be released from the treaty of alliance.

A certain amount of disagreement as to the cases in which the clause might, or might not, be justly applied will of course always remain as long as there is no international court which could decide each case. But the fact is remarkable that since the beginning of the nineteenth century only very few cases of the application of the clause have occurred. And there is no doubt that during the last century a conviction became more and more prevalent that the clause, *rebus sic stantibus*,

ought not to give a State the right, immediately upon the happening of a vital change of circumstances, to declare itself free from the obligations of a treaty, but should only entitle it to claim to be released from them by the other party or parties to the treaty. Accordingly, when a State is of the opinion that the obligations of a treaty have, through a vital change of circumstances, become unbearable, it should first approach the other party or parties, and request them to abrogate the treaty.¹ If such abrogation be refused, a conflict arises between the treaty obligations and the right to be released from them, which, in the absence of an international court that could give judgment in the matter, cannot be settled juridically. It is only then that a State may perhaps be justified in declaring that it can no longer consider itself bound by those obligations.

The conviction that a State has no right to liberate itself from the obligations of a treaty, without having first asked the other party or parties for its release from them, became apparent when, in 1870, during the Franco-German War, Russia declared her withdrawal from the stipulations of the Treaty of Paris of 1856, which concerned the neutralisation of the Black Sea, and imposed a restriction upon her in regard to men-of-war in that sea. Great Britain protested, and a conference was held in London in 1871. Although by a treaty signed on March 13, 1871, this conference, consisting of the signatory Powers of the Treaty of Paris—namely, Austria, England, France, Germany, Italy, Russia, and Turkey—complied with the wishes of Russia, and abolished the neutralisation of the Black Sea, it had adopted in a protocol² of January 17, 1871, the following declaration: ‘C’est un principe essentiel du droit des gens qu’aucune Puissance ne peut se délier

¹ See now Phillimore, *Three Centuries of Treaties of Peace* (1917), pp. 134-139, for a more detailed

discussion of the same argument.

² See Martens, *N.R.G.*, xviii. p. 278.

des engagements d'un traité, ni en modifier les stipulations, qu'à la suite de l'assentiment¹ des parties contractantes, au moyen d'une entente amicale.'

In spite of this declaration, signed also by herself, Russia in 1886 notified her withdrawal from Article 59 of the Treaty of Berlin of 1878 stipulating the freedom of the port of Batoum.² The signatory Powers of the Treaty of Berlin seem to have tacitly consented, with the exception of Great Britain, who protested. Again, in October 1908, Austria-Hungary, in defiance of Article 25 of the Treaty of Berlin, 1878, proclaimed her sovereignty over Bosnia and Herzegovina, which hitherto had been under her occupation and administration, and simultaneously Bulgaria, in defiance of Article 1 of the same treaty, declared herself independent.³ Thus the standard value of the declaration of the Conference of London of 1871 has become doubtful again, and must remain doubtful until an independent international court is created with jurisdiction to set aside a treaty obligation which has become too oppressive. It has already been mentioned (above, § 167*o* (2)) that the Covenant of the League has attempted to deal with the problem, and reasons have been given (above, § 167*s* (4)) for regarding the means adopted as unsatisfactory.

¹ Whatever be the merits of this declaration, it certainly goes too far in declaring that a State can only free itself from the obligations of a treaty by agreement with the other party, for—see below, § 547—a State may cancel a treaty if the other party to it violates it.

² See Martens, *N.R.G.*, 2nd Ser. xiv. p. 170, and Rolin-Jaequemyns in *R.I.*, xix. (1887), pp. 37-49.

³ See above, § 50; Martens, *N.R.G.*, 3rd Ser. ii. pp. 656, 666; and Bloiszewski in *R.G.*, xvii. (1910), pp. 417-449. There is hardly any doubt that, if Austria-Hungary had not ignored the above-mentioned

declaration contained in the protocol of January 17, 1871, and had approached the Powers in the matter, the abrogation of Article 25 of the Treaty of Berlin would have been granted, and she would have been allowed to annex Bosnia and Herzegovina, after having indemnified Turkey. This is to be inferred from the fact that, when Austria-Hungary proclaimed her sovereignty over the provinces, Turkey accepted compensation, and the Powers, which had at first protested and demanded an international conference, consented to the abrogation of Article 25 of the Treaty of Berlin.

X

VOIDANCE OF TREATIES

See the literature quoted at the commencement of § 534.

Grounds
of Void-
ance.

§ 540. A treaty, although it has neither expired, nor been dissolved, may nevertheless lose its binding force by becoming void.¹ And such voidance may have different grounds—namely, extinction of one of the two contracting parties, impossibility of execution, realisation of the purpose of the treaty otherwise than by fulfilment, and, lastly, extinction of such object as was concerned in a treaty.

Extinc-
tion of
One of the
Two Con-
tracting
Parties.

§ 541. All treaties concluded between two States become void through the extinction of one of the contracting parties, provided that they do not devolve upon the State which succeeds to the extinct State. That some treaties devolve upon the successor has been shown above (§ 82): but many treaties do not. On this ground all political treaties, such as treaties of alliance, guarantee, neutrality, and the like, become void.

Impossi-
bility of
Execu-
tion.

§ 542. All treaties, the execution of which becomes impossible subsequently to their conclusion, are thereby rendered void. A frequently quoted example is that of three States concluding a treaty of alliance, and subsequent war breaking out between two of them. In such a case, it is impossible for the third party to execute the treaty, and it becomes void.² It must, however, be added that the impossibility of execution

¹ But such voidance must not be confounded with the voidance of a treaty from its very beginning: see above, § 501.

² See also above, § 521, where the

case is mentioned in which a treaty essentially presupposes a certain form of government, and for this reason cannot be executed when this form of government undergoes a change.

may be temporary only, and that then the treaty is not void, but merely suspended.

§ 543. All treaties the purpose of which is realised otherwise than by fulfilment become void. For example, a treaty concluded by two States for the purpose of inducing a third State to undertake a certain obligation becomes void, if the third State voluntarily undertakes the obligation before the two contracting States have had an opportunity of approaching it with regard to the matter.

Realisation of Purpose of Treaty other than by Fulfilment.

§ 544. All treaties, the obligations of which concern a certain object, become void through the extinction of such object. Treaties, for example, concluded in regard to a certain island become void, when such island disappears through the operation of nature; so do treaties concerning a third State, when such State merges in another.

Extinction of such Object as was concerned in a Treaty.

XI

CANCELLATION OF TREATIES

See the literature quoted at the commencement of § 534.

§ 545. A treaty, although it has neither expired, nor been dissolved, nor become void, may nevertheless lose its binding force by cancellation. The causes of cancellation are four—namely, inconsistency with International Law created subsequently to the conclusion of the treaty, violation by one of the contracting parties, subsequent change of status of one of them, and war.

Grounds of Cancellation.

§ 546. Just as treaties have no binding force when concluded with reference to an illegal object, so they lose their binding force when through a progressive development of International Law they become inconsistent with the latter. A valuable example is the

Inconsistency with subsequent International Law.

abolition of privateering by the Declaration of Paris of 1856, in consequence of which any previous treaties based on privateering as a recognised institution of International Law were *ipso facto* cancelled, provided that all the parties to such treaties were signatory Powers of the Declaration of Paris. This must be maintained in spite of the fact that Protocol No. 24 of the Congress of Paris¹ contains the following: 'Sur une observation faite par MM. les Plénipotentiaires de la Russie, le Congrès reconnaît que la présente résolution, ne pouvant avoir d'effet retroactif, ne saurait invalider les conventions antérieures.' This expression of opinion can only mean that previous treaties with such States as were not and would not become parties to the Declaration of Paris were not *ipso facto* cancelled by the declaration. Be that as it may, subsequent Municipal Law can certainly have no derogating influence upon existing treaties. On occasions, indeed, subsequent Municipal Law does create for a State a conflict between its treaty obligations and such law. In such a case this State must endeavour to obtain a release by the other contracting party from these obligations.²

Violation
by one of
the Con-
tracting
Parties.

§ 547. Violation³ of a treaty by one of the contracting States does not *ipso facto* cancel the treaty; but it is within the discretion⁴ of the other party to cancel it on this ground. There is indeed no unanimity among writers on International Law in regard to this point, since a minority make a distinction between essential

¹ See Martens, *N.R.G.*, xv, pp. 768-769.

² That municipal courts must apply the subsequent Municipal Law, although it conflicts with previous treaty obligations, there is no doubt, as has been pointed out above, § 21. See *The Cherokee Tobacco*, 11 Wall 616; *Whitney v. Robertson*, 124 U.S. 190; *Botiller v. Dominguez*,

130 U.S. 238. See also Moore, v. § 774.

³ See Myers in *A.J.*, xi. (1917), pp. 794-819, and xii. (1918), pp. 96-161, where a number of treaty violations are discussed.

⁴ This was recognised in 1913 by the United States Supreme Court in *Charlton v. Kelly*, 229 U.S. 447.

and non-essential stipulations of the treaty, and maintain that only violation of essential stipulations creates a right for the other party to cancel the treaty. But the majority of writers rightly oppose this distinction, maintaining that it is not always possible to distinguish essential from non-essential stipulations, that the binding force of a treaty protects non-essential as well as essential stipulations, and that it is for the faithful party to consider for itself whether violation of a treaty, even in its least essential parts, justifies its cancellation. The case, however, is different, when a treaty expressly stipulates that it should not be considered broken merely by violation of one or another part of it. And it must be emphasised that the right to cancel the treaty on the ground of its violation must be exercised within a reasonable time after the violation has become known. If the Power possessing such a right does not exercise it in due time, it must be taken for granted that such right has been waived. A mere protest, such as the protest of England in 1886 when Russia withdrew from Article 59 of the Treaty of Berlin of 1878, which stipulated the freedom of the port of Batoum, neither constitutes a cancellation, nor reserves the right of cancellation.¹

§ 548. A cause which *ipso facto* cancels treaties is such subsequent change of status of one of the contracting States as transforms it into a dependency of another State. As everything depends upon the merits of each case, no general rule can be laid down as regards the question when such change of status must be considered to have taken place, or, further, as regards the other question as to the kind of treaties cancelled by such change.² Thus, for example, when a State becomes a member of a Federal State, it is obvious that all its

Sub-
sequent
Change of
Status of
One of the
Contract-
ing
Parties.

¹ This was recognised in 1913 by the United States Supreme Court in *Charlton v. Kelly*, 229 U.S. 447.

² See Moore, v. § 773, and above, § 82, pp. 147, n. 1, and § 521.

treaties of alliance are *ipso facto* cancelled, for in a Federal State the power of making war rests with the Federal State, and not with the several members. And the same is valid as regards a hitherto full sovereign State which comes under the suzerainty of another State. On the other hand, a good many treaties retain their binding force in spite of such a change in the status of a State,—all such treaties, namely, as concern matters in regard to which the State has not lost its sovereignty through the change. For instance, if the constitution of a Federal State stipulates that the matter of extradition remains wholly within the competence of the member-States, all treaties of extradition concluded by members with third States, previously to their becoming members of the Federal State, retain their binding force.

War. § 549. How far war is a general ground of cancellation of treaties is not quite settled. Details on this point will be given below, vol. ii. § 99.

XII

RENEWAL, RECONFIRMATION, AND REDINTEGRATION OF TREATIES

Vattel, ii. § 199—Hall, § 117—Taylor, § 400—Hartmann, § 57—Ullmann, § 85—Bonfils, Nos. 851-854—Despagnet, No. 456—Pradier-Fodéré, ii. Nos. 1191-1199—Rivier, ii. pp. 143-146—Calvo, iii. §§ 1637, 1666, 1669—Fiore, ii. Nos. 1048-1049, and *Code*, Nos. 840-843.

Renewal
of
Treaties.

§ 550. Renewal of treaties is the term for the prolongation, before their expiration, of such treaties as were concluded for a limited period of time. Renewal can take place through a new treaty, and the old treaty may then be renewed as a whole, or only in part. But the renewal can also take place automatically, since many treaties concluded for a certain period stipulate

expressly that they are to be considered as renewed for another period, in case neither of the contracting parties has given notice.

§ 551. Reconfirmation is the term for an express statement, made in a new treaty, that a certain previous treaty, whose validity has, or might have, become doubtful, is still, and remains, valid. Reconfirmation takes place after such changes of circumstances as might be considered to interfere with the validity of a treaty ; for instance, after a war, as regards such treaties as have not been cancelled by the outbreak of war. Reconfirmation can be given to the whole of a previous treaty, or to parts of it only. Sometimes reconfirmation is given in a precise way, namely, where a new treaty stipulates that a previous treaty shall be incorporated in itself. It must be emphasised that, in such a case, those parties to the new treaty, which were not parties to the previous treaty, do not now become so by its reconfirmation, the latter applying to the previous contracting parties only. Recon-
firmation.

§ 552. Treaties which have lost their binding force, through expiration or cancellation, may regain it through redintegration. A treaty becomes redintegrated by the mutual consent of the contracting parties ; this is, as a rule, given in a new treaty. Thus it is usual for treaties of peace to redintegrate all those treaties cancelled through the outbreak of war, the stipulations of which the contracting parties do not want to alter. Redinte-
gration.

Without doubt, redintegration need not necessarily take place by treaty, as it is theoretically possible for the contracting parties tacitly to redintegrate an expired or cancelled treaty by a line of conduct which makes their intention to redintegrate the treaty apparent. However, I do not know of any instance of such tacit redintegration.

XIII

INTERPRETATION OF TREATIES

Grotius, ii. c. 16—Vattel, ii. §§ 262-322—Hall, §§ 111-112—Phillimore, ii. §§ 64-95—Halleck, i. pp. 317-327—Taylor, §§ 377-393—Walker, § 31—Wheaton, § 287—Moore, v. §§ 763-764—Hershey, No. 299—Heffter, § 95—Ullmann, § 84—Heilborn in Stier-Somlo, i. pp. 72-78—Bonfils, Nos. 835-837—Despagnet, No. 450—Pradier-Fodéré, ii. Nos. 1171-1189—Mérignhac, ii. p. 678—Nys, ii. pp. 520-522—Rivier, ii. pp. 122-125—Calvo, iii. §§ 1649-1660—Fiore, ii. Nos. 1032-1046, and *Code*, Nos. 797-821—Martens, i. § 116—Westlake, i. pp. 293-294—Foster, *The Practice of Diplomacy* (1906), pp. 284-297—Crandall, *op. cit.*, §§ 160-171—Pick in *R.G.*, xvii. (1910), pp. 5-35—Hyde in *A.J.*, iii. (1909), pp. 46-61.

Authentic
Interpre-
tation,
and the
Com-
promise
Clause.

§ 553. Neither customary nor conventional rules of International Law exist concerning the interpretation of treaties. Grotius and the later authorities applied the rules of Roman Law respecting interpretation in general to the interpretation of treaties. On the whole, such application is correct, in so far as those rules of Roman Law are full of common sense. But it must be emphasised that the interpretation of treaties is, in the first instance, a matter of consent between the contracting parties. If they choose a certain interpretation, no other has any basis. It is only when they disagree, that an interpretation based on scientific grounds can ask a hearing. And these scientific grounds can be no other than those provided by jurisprudence. The best means of settling questions of interpretation, provided the parties cannot come to terms, is by arbitration, as the appointed arbitrators will apply the general rules of jurisprudence.¹ Now in regard to interpretation given by the parties themselves, there are two different ways open to them. They may either agree informally upon the interpretation, and execute the treaty accordingly; or they may make a supple-

¹ See Article 13 of the Covenant of the League of Nations: 'Disputes as to the interpretation of a treaty

... are generally suitable for submission to arbitration.'

mentary treaty, and provide therein for such interpretation of the previous treaty as they choose. In the latter case, one speaks of 'authentic' interpretation, by analogy with the authentic interpretation of Municipal Law, given expressly by a statute. Nowadays, however, treaties very often contain the so-called 'compromise clause.' This is a clause providing that in case the parties do not agree on questions of interpretation, these questions shall be settled by arbitration. Italy and Switzerland regularly endeavour to insert that clause in their treaties.

§ 554. It is of importance to enumerate some rules of interpretation¹ which recommend themselves on account of their suitability.²

Rules of Interpretation which recommend themselves.

(1) All treaties must be interpreted according to their reasonable, in contradistinction to their literal, sense. An excellent example illustrating this rule is the following, which is quoted by several writers:—In the interest of Great Britain, the Treaty of Peace of Utrecht of 1713 stipulated, in Article 9, that the port, and the fortifications, of Dunkirk should be destroyed, and never be rebuilt. France complied with this stipulation; but at the same time began building an even larger port at Mardyck, a league off Dunkirk. Great Britain protested, on the ground that France, in so acting, was violating the reasonable, although not the literal, sense of the Peace of Utrecht; and France in the end recognised this interpretation, and discontinued the building of the new port.

(2) The terms used in a treaty must be interpreted according to their usual meaning in the language of everyday life, provided that they are not expressly

¹ The whole matter of interpretation of treaties is dealt with in an admirable way by Phillimore, ii. §§ 64-95; see also Moore, v. § 763, and Wharton, ii. § 133.

² On the violation of treaties in consequence of defective drafting, see Myers in *A.J.*, xi. (1917), pp. 538-565.

used in a certain technical meaning, or that another meaning is not apparent from the context.

(3) It is taken for granted that the contracting parties intend something reasonable, something adequate to the purpose of the treaty, and something not inconsistent with generally recognised principles of International Law, nor with previous treaty obligations towards third States. If, therefore, the meaning of a stipulation is ambiguous, the reasonable meaning is to be preferred to the unreasonable, the more reasonable to the less reasonable, the adequate meaning to the meaning not adequate for the purpose of the treaty, the consistent meaning to the meaning inconsistent with generally recognised principles of International Law, and with previous treaty obligations towards third States.

(4) The whole of the treaty must be taken into consideration, if the meaning of any one of its stipulations is doubtful; and not only the wording of the treaty, but also its purpose, the motives which led to its conclusion, and the conditions prevailing at the time.

(5) The principle, in *dubio mitius*, must be applied in interpreting treaties. If, therefore, the meaning of a stipulation is ambiguous, that meaning is to be preferred which is less onerous for the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.

(6) Previous treaties between the same parties, and treaties between one of the parties and third parties, may be referred to for the purpose of clearing up the meaning of a stipulation.

(7) If there is a discrepancy between the clear meaning of a stipulation and the intention of one of the parties as declared during the negotiations which preceded the signing of a treaty, the decision must depend on the merits of the special case. If, for instance, the

discrepancy was produced through a mere clerical error, or by some other kind of mistake, it is obvious that an interpretation is necessary which is in accordance with the real intentions of the contracting parties.

(8) In case of a discrepancy between the clear meaning of a stipulation and the intentions of all the parties as unanimously declared during the negotiations which preceded the signing of the treaty, the meaning which corresponds to the real intentions of the parties must prevail over the meaning of the text. If, therefore—as in the case of the unratified Declaration of London of 1909—the Report of the Drafting Committee contains certain interpretations, and is unanimously accepted as authoritative by all the negotiators previous to the signing of the treaty, their interpretations must prevail.

(9) If two meanings of a stipulation are admissible according to the text of a treaty, such meaning is to prevail as the party proposing the stipulation knew at the time to be the meaning preferred by the party accepting it.

(10) If it is a matter of common knowledge that a State upholds a meaning of a term which is different from the generally accepted meaning, and if nevertheless another State enters into a treaty with the former in which such term is made use of, that meaning must prevail which is upheld by the former. If, for instance, States conclude commercial treaties with the United States of America in which the most-favoured-nation clause¹ occurs, the particular meaning which the United States attributes to this clause must prevail.

(11) If the meaning of a stipulation is ambiguous, and one of the contracting parties, at a time before a case arises for the application of the stipulation, makes known what meaning it attributes to it, the other party or parties cannot, when a case for its application does occur, insist upon a different meaning. They ought to

¹ See below, § 580.

have previously protested, and taken the necessary steps to secure an authentic interpretation of the ambiguous stipulation. Thus, when, in 1911, it became obvious that Germany and other Continental States attributed to Article 23 (*h*) of the Hague Regulations respecting the Laws and Usages of War on Land a meaning different from the one preferred by Great Britain, the British Foreign Office made the British interpretation of this article known.¹

(12) It is to be taken for granted that the parties intend the stipulations of a treaty to have a certain effect, and not to be meaningless. Therefore, an interpretation is not admissible which would make a stipulation meaningless, or ineffective.

(13) All treaties must be interpreted so as to exclude fraud, and so as to make their operation consistent with good faith.

(14) The rules commonly applied by the courts for the interpretation and construction of Municipal Laws are only applicable to the interpretation and construction of treaties, and in particular of law-making treaties, in so far as they are general rules of jurisprudence. If they are rules sanctioned only by the Municipal Law, or by the practice of the courts, of a particular country, they may not be applied.

(15) Unless the contrary is expressly provided,² if a treaty is concluded in two languages and there is a discrepancy between the meaning of the two different texts,³ each party is only bound by the text in its own language. Moreover, a party cannot claim the benefit of the text in the language of the other party.

¹ See Oppenheim, *The League of Nations* (1919), p. 48.

² The Treaty of Peace with Germany is in French and English; and it is expressly stipulated that both texts are authentic. The Treaties of Peace with Austria and Bulgaria are in French, English, and

Italian; but it is expressly declared that the French text shall prevail, except in the League of Nations and Labour Parts.

³ See Foster, *The Practice of Diplomacy* (1906), where some interesting cases are discussed.

CHAPTER III

IMPORTANT GROUPS OF TREATIES

I

IMPORTANT LAW-MAKING TREATIES

§ 555. Law-making treaties¹ have been concluded ever since International Law came into existence. It was not until the nineteenth century, however, that there were law-making treaties of world-wide importance. Although at the Congress at Münster and Osnabrück all the European Powers then existing, with the exception of Great Britain, Russia, and Poland, were represented, the Westphalian Peace of 1648, to which France, Sweden, and the States of the German Empire were parties, and which recognised the independence of Switzerland and the Netherlands and the practical sovereignty of the 332 States of the German Empire, was not of world-wide importance, in spite of the fact that it contained various law-making stipulations. And the same may be said with regard to all other treaties of peace between 1648 and 1815. The first law-making treaty of world-wide importance was the Final Act of the Vienna Congress, 1815. But it must be particularly noted that not all of these are *pure* law-making treaties, since many contain other stipulations besides those which are law-making.

Important
Law-
making
Treaties a
product of
the Nine-
teenth
Century.

¹ Concerning the conception of law-making treaties, see above, §§ 18 and 492.

Final Act of the Vienna Congress. § 556. The Final Act of the Vienna Congress,¹ signed on June 9, 1815, by Great Britain, Austria, France, Portugal, Prussia, Russia, Spain, and Sweden-Norway, comprised law-making stipulations of world-wide importance concerning four points—namely, the perpetual neutralisation of Switzerland (Article 118, No. 11); free navigation on so-called international rivers (Articles 108-117); the abolition of the negro slave trade (Article 118, No. 15); and the different classes of diplomatic envoys (Article 118, No. 17).

Protocol of the Congress of Aix-la-Chapelle. § 557. The Protocol of November 21 of the Congress of Aix-la-Chapelle,² 1818, signed by Great Britain, Austria, France, Prussia, and Russia, contained the important law-making stipulation concerning the establishment of a fourth class of diplomatic envoys, the so-called 'Ministers Resident,' to rank before the *Chargés d'Affaires*.

Treaty of London of 1831. § 558. The Treaty of London³ of November 15, 1831, signed by Great Britain, Austria, France, Prussia, Russia, and Belgium, comprised in its Article 7 the important law-making stipulation concerning the perpetual neutralisation of Belgium; but arrangements are about to be made, under which Belgium will no longer be permanently neutralised.

Declaration of Paris. § 559. The Declaration of Paris⁴ of April 16, 1856, signed by Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, is a pure law-making treaty of the greatest importance, stipulating four rules with regard to sea warfare—namely, that privateering is abolished; that the neutral flag covers enemy goods with the exception of contraband of war; that neutral goods, contraband excepted, cannot be confiscated even

¹ Martens, *N.R.*, ii. p. 379. See Angeberg, *Le Congrès de Vienne et les Traités de 1815* (4 vols., 1863).

² Martens, *N.R.*, iv. p. 648. See Angeberg, *op. cit.*

³ Martens, *N.R.*, xi. p. 390. See Descamps, *La Neutralité de la Belgique* (1902).

⁴ Martens, *N.R.G.*, xv. p. 767.

when sailing under the enemy flag; that a blockade must be effective to be binding.

Through accession during 1856, the following other States became parties to this treaty: Argentina, Belgium, Brazil, Chili, Denmark, Ecuador, Greece, Guatemala, Haiti, Holland, Peru, Portugal, Sweden-Norway, and Switzerland. Japan acceded in 1886, Spain in 1908, and Mexico in 1909.

§ 560. The Geneva Convention ¹ of August 22, 1864, and that of July 6, 1906, are pure law-making treaties for the amelioration of the conditions of the wounded of armies in the field. The Geneva Convention of 1864 was originally signed only by Switzerland, Baden, Belgium, Denmark, France, Hesse, Holland, Italy, Portugal, Prussia, Spain, and Würtemberg, but in time almost all other civilised States have acceded. A treaty ² containing articles additional to the Geneva Convention of 1864 was signed at Geneva on October 20, 1868, but was not ratified. A better fate was in store for the Geneva Convention ³ of 1906, which was signed by the delegates of thirty-five States, and has been ratified by not less than twenty-six States. At least eight other States have acceded. It is of importance to emphasise that the Convention of 1864 is not entirely replaced by the Convention of 1906, in so far as the former remains in force between those Powers which are parties to it without being parties to the latter. And it must be remembered that a convention for the adaptation to sea warfare of the principles of the Geneva Convention was signed at both the first and the second Hague Conferences.

§ 561. The Treaty of London ⁴ of May 11, 1867,

¹ Martens, *N.R.G.*, xviii. p. 607. See Laeder, *Die Genfer Convention* (1876), and Münzel, *Untersuchungen über die Genfer Convention* (1901).

² Martens, *N.R.G.*, xviii. p. 612.

³ Martens, *N.R.G.*, 3rd Ser. ii. p. 323.

⁴ Martens, *N.R.G.*, xviii. p. 445. See Wampach, *Le Luxembourg neutre* (1900).

Treaty of signed by Great Britain, Austria, Belgium, France, London of Holland, Italy, Prussia, and Russia, comprised in its 1867. Article 2 the important law-making stipulation concerning the perpetual neutralisation of Luxemburg; but arrangements are now foreshadowed under which Luxemburg will no longer be permanently neutralised.

Declara- § 562. The Declaration of St. Petersburg ¹ of December tion of St. 11, 1868, signed by Great Britain, Austria-Hungary, Peters- Belgium, Denmark, France, Greece, Holland, Italy, burg. Persia, Portugal, Prussia and other German States, Russia, Sweden-Norway, Switzerland, and Turkey—Brazil acceded later on—is a pure law-making treaty. It stipulates that projectiles of a weight below 400 grammes (14 ounces) which are either explosive or charged with inflammable substances shall not be made use of in war.

Treaty of § 563. The Treaty of Berlin ² of July 13, 1878, signed Berlin of by Great Britain, Austria-Hungary, France, Germany, 1878. Italy, Russia, and Turkey, was law-making with regard to Bulgaria, Montenegro, Roumania, and Serbia.

General § 564. The General Act of the Congo Conference ³ of Act of the Berlin of February 26, 1885, signed by Great Britain, Congo Confer- Austria-Hungary, Belgium, Denmark, France, Germany, ence, and Holland, Italy, Portugal, Russia, Spain, Sweden-Norway, Conven- tion of St. Turkey, and the United States of America, ⁴ was a law- Germain. making treaty of great importance, stipulating : freedom of commerce for all nations within the basin of the river Congo ; prohibition of slave transport within that basin ; optional neutralisation of Congo territories ; freedom of navigation for merchantmen of all nations on the rivers Congo and Niger ; and, lastly, the obligation of the signatory Powers to notify to one another

¹ Martens, *N.R.G.*, xviii. p. 474.

² Martens, *N.R.G.*, 2nd Ser. iii. p. 449. See Mulas, *Il Congresso di Berlino* (1878).

³ Martens, *N.R.G.*, 2nd Ser. x.

p. 414. See Patzig, *Die afrikanische Konferenz und der Congostaat* (1885).

⁴ The United States did not, however, ratify ; see Moore, v. p. 564.

all future occupations on the coast of the African continent.

But by a convention signed at St. Germain on September 10, 1919,¹ by the United States of America, Belgium, the British Empire, France, Italy, Japan, and Portugal, for the purpose of revising these arrangements, the General Act of the Berlin Congo Conference was abrogated, in so far as it was binding between the Powers which are parties to the new convention. This convention makes renewed provision for commercial equality, within the basin of the Congo as defined by the Berlin Act, among the signatory Powers and those States which are invited to accede; and for freedom of navigation for merchantmen of all such States on the rivers Congo and Niger. The parties undertake to endeavour to secure the complete suppression of slavery, and of the slave trade by land and sea, and to protect religious, scientific, and charitable institutions organised by any one of them, or by a State invited to accede. The convention is to be revised by the signatory Powers at the end of ten years; any dispute arising under it, which cannot be settled by negotiation, is to be submitted to arbitration, in conformity with the Covenant of the League of Nations. The article in the Berlin Act requiring notification of occupations does not appear in the new convention. Germany,² Austria,³ and Bulgaria⁴ are bound to accept these arrangements, and probably Hungary and Turkey will be placed under a similar obligation, by the Treaties of Peace.

§ 565. The Treaty of Constantinople⁵ of October 29, 1888, signed by Great Britain, Austria-Hungary,⁶

¹ Treaty Ser. (1919), No. 18. Cmd. 477.

² Article 126.

³ Article 373.

⁴ Article 290.

⁵ Martens, *N.R.G.*, 2nd Ser. xv. p. 557. See above, § 183.

⁶ As to the consent given by Austria in the Treaty of Peace with Austria to the transfer to Great Britain of the powers conferred on the Sultan by the Treaty of Constantinople, see above, § 183.

Treaty of
Constantinople of
1888.

France, Germany,¹ Holland, Italy, Russia, Spain, and Turkey,¹ is a pure law-making treaty, stipulating the permanent neutralisation of the Suez Canal, and the freedom of navigation thereon for vessels of all nations.

General
Act of the
Brussels
Anti-
Slavery
Conference, and
the Con-
ventions
of St.
Germain.

§ 566. The General Act of the Brussels Anti-Slavery Conference,² signed on July 2, 1890, by Great Britain, Austria-Hungary, Belgium, the Congo Free State, Denmark, France,³ Germany, Holland, Italy, Persia, Portugal, Russia, Sweden-Norway, Spain, Turkey, the United States of America, and Zanzibar, was a law-making treaty of great importance, which stipulated for a system of measures for the suppression of the slave trade in Africa, and, incidentally, restrictive measures concerning the spirit trade in certain parts of Africa. To revise the stipulations concerning this spirit trade, the Convention of Brussels⁴ of November 3, 1906, was signed by Great Britain, Germany, Belgium, Spain, the Congo Free State, France, Italy, Holland, Portugal, Russia, and Sweden.

But by two conventions signed at St. Germain on September 10, 1919, for the purpose of revising these arrangements, one being the convention referred to above, § 564, and the other being a convention relating to the liquor traffic in Africa,⁵ to which the same States were parties, the General Act of the Brussels Anti-Slavery Conference, and its accompanying declaration, and all the provisions of former general conventions dealing with the liquor trade in Africa, were abrogated, in so far as they were binding between the parties to the new conventions. The first, as has already

¹ As to the consent of Germany to the transfer to Great Britain of the rights of the Sultan under this treaty, see above, § 183. Turkish rights will probably be transferred under the Treaty of Peace with Turkey.

² Martens, *N.R.G.*, 2nd Ser. xvi. p. 3, and xxv. p. 543. See Lentner,

Der afrikanische Sklavenhandel und die Brüsseler Konferenzen (1891).

³ But France only ratified this General Act with the exclusion of certain articles.

⁴ Martens, *N.R.G.*, 3rd Ser. i. p. 722.

⁵ Treaty Ser. (1919), No. 19, Cmd. 478.

been mentioned,¹ contains an undertaking by the signatory Powers to endeavour to secure the complete suppression of slavery and the slave trade. The second prohibits altogether a harmful class of beverage known as 'trade spirits,' and all distilled beverages containing ingredients injurious to health, over the whole African continent, excepting Algiers, Tunis, Morocco, Libya, Egypt, and South Africa. A heavy minimum duty is imposed on the import into this area of all distilled beverages which do not fall within the prohibited classes, and even these may not be manufactured anywhere within the area, except in the Italian colonies. Each party is to publish an annual report showing the quantities of liquors manufactured in, or imported into, this area; and this report is to be sent to the Secretary-General of the League of Nations, and to a central international office, to be established under the convention.² The convention may be modified by common agreement after five years; any dispute arising under it, which cannot be settled by negotiation, is to be submitted to arbitration, in conformity with the Covenant of the League of Nations. Germany,³ Austria,⁴ and Bulgaria⁵ are bound to accept the convention, and probably Hungary and Turkey will be placed under a similar obligation, by the Treaties of Peace.

§ 567. The Final Act of the Hague Peace Conference⁶ of July 29, 1899, was a pure law-making treaty comprising three separate conventions—namely, a convention for the peaceful adjustment of international differences, a convention concerning the law of land warfare, and a convention for the adaptation to maritime warfare of the principles of the Geneva Convention

Two
Declarations
of
the First
Hague
Peace
Conference.

¹ See above, § 564.

² See above, § 471e.

³ Article 126.

⁴ Article 373.

⁵ Article 290.

⁶ Martens, *N. R. G.*, 2nd Ser. xxvi. p. 920. See Holls, *The Peace Conference at the Hague* (1900), and Mérignhac, *La Conférence internationale de la Paix* (1900).

of 1864,—and three declarations—namely, a declaration prohibiting, for a term of five years, the discharge of projectiles and explosives from balloons, a declaration concerning the prohibition of the use of projectiles the only object of which is the diffusion of asphyxiating or deleterious gases, and a declaration concerning the prohibition of so-called dum-dum bullets. All these conventions, however, and the first of these declarations have been replaced by the General Act of the Second Hague Peace Conference, and only the last two declarations are still in force. All the States which were represented at the Conference are now parties to these declarations except the United States of America.

Treaty of
Washington of
1901.

§ 568. The so-called Hay-Pauncefote Treaty of Washington¹ between Great Britain and the United States of America, signed November 18, 1901, although law-making between the parties only, is nevertheless of world-wide importance, because it neutralises permanently the Panama Canal, which was then in course of construction, and stipulates free navigation thereon for vessels of all nations.²

§ 568*a*. The Final Act of the Second Hague Peace Conference of October 18, 1907, is a pure law-making treaty of enormous importance, comprising the following thirteen conventions and a declaration³ :—

¹ Martens, *N.R.G.*, 2nd Ser. xxx. p. 631.

² It ought to be mentioned that Article 5 of the Boundary Treaty of Buenos Ayres, signed by Argentina and Chili on July 23, 1881—see Martens, *N.R.G.*, 2nd Ser. xii. p. 491—contains a law-making stipulation of world-wide importance, because it neutralises the Straits of Magellan for ever, and declares them open to vessels of all nations. See above, § 195 n., and below, vol. ii. § 72.

³ All the conventions except the xivth have been ratified by a large number of the signatory Powers, but by no means all. Tables have

been published from time to time, showing the States which had then ratified, or acceded to, the various conventions. See the table in Scott in *The Hague Conventions and Declarations of 1899 and 1907* (1915), which is vouched for by the State Department at Washington as being correct at that date. A more recent table is to be found in Hall, 7th ed. (1917), p. 818. During 1917 China acceded to the ivth, vith, viiith, viiiith and ixth Conventions. Official announcements of ratifications and accessions are made in Great Britain in the Treaty Series of Parliamentary Papers.

I. *Convention for the Pacific Settlement of International Disputes.* Conventions and Declarations of Second Hague Peace Conference.—All forty-four States represented at the Conference signed except Nicaragua, but some signed with reservations. Nicaragua acceded later. At least twenty-four States have ratified, with or without reservations.

II. *Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts.*—Great Britain, Germany, the United States of America, Argentina, Austria-Hungary, Bolivia, Bulgaria, Chili, Colombia, Cuba, Denmark, San Domingo, Ecuador, Spain, France, Greece, Guatemala, Haiti, Italy, Japan, Mexico, Montenegro, Norway, Panama, Paraguay, Holland, Peru, Persia, Portugal, Russia, Salvador, Serbia, Turkey, and Uruguay signed this convention; China, Nicaragua, and Liberia acceded later. Some of the South American States signed with reservations. Seventeen States have ratified, with or without reservations.

III. *Convention relative to the Opening of Hostilities.*—All the States represented at the Conference signed except China and Nicaragua; both, however, acceded later. Twenty-five of the signatory States have ratified. Liberia acceded in 1914.

IV. *Convention concerning the Laws and Customs of War on Land.*—All the States represented at the Conference signed except China, Spain, and Nicaragua, but Nicaragua and China acceded later. Some States made reservations in signing. Twenty-five signatory States have ratified, with or without reservations. Liberia acceded in 1914.

V. *Convention respecting the Rights and Duties of Neutral Powers and Persons in War on Land.*—All the States represented at the Conference signed except China and Nicaragua, but some States made reservations. Both China and Nicaragua acceded later. At least twenty-three States have ratified; Great Britain has not done so. Liberia acceded in 1914.

VI. *Convention relative to the Status of Enemy Merchant-ships at the Outbreak of Hostilities.*—All the Powers represented at the Conference signed except the United States of America, China, and Nicaragua, but the last two States acceded later. Some States made reservations in signing. Twenty-four States have ratified, with or without reservations. Liberia acceded in 1914.

VII. *Convention relative to the Conversion of Merchant-ships into War-ships.*—All the Powers represented at the Conference signed except the United States of America, China, San Domingo, Nicaragua, and Uruguay, but Nicaragua acceded later. Turkey

made a reservation in signing. Twenty-three States have ratified. Liberia acceded in 1914.

VIII. *Convention relative to the Laying of Automatic Submarine Contact Mines*.—The majority of the States represented at the Conference signed. China, Spain, Montenegro, Nicaragua, Portugal, Russia, and Sweden have not signed, but Nicaragua and China acceded later. Some States made reservations. Twenty States have ratified, with or without reservations. Liberia acceded in 1914.

IX. *Convention respecting Bombardments by Naval Forces in Time of War*.—Except China, Spain, and Nicaragua, all the States represented at the Conference signed, and China, Spain, and Nicaragua acceded later. Some States made reservations. Twenty-five States have ratified, with or without reservations. Liberia acceded in 1914.

X. *Convention for the Adaptation of the Principles of the Geneva Convention to Maritime Warfare*.—All the Powers represented at the Conference signed except Nicaragua, but some made reservations. Nicaragua acceded later. At least twenty-four States have ratified, with or without reservations.

XI. *Convention relative to certain Restrictions on the Exercise of the Right of Capture in Maritime War*.—All States represented at the Conference signed, except China, Montenegro, Nicaragua, and Russia, and Nicaragua and China acceded later. Twenty-three States have ratified. Liberia acceded in 1914.

XII. *Convention relative to the Establishment of an International Prize Court*.—The majority of the States represented at the Conference signed. Brazil, China, San Domingo, Greece, Luxemburg, Montenegro, Nicaragua, Roumania, Russia, Serbia, and Venezuela have not signed, and some of the smaller signatory Powers made a reservation with regard to the composition of the Court according to Article 15 of the convention. No State has, however, ratified this convention.

XIII. *Convention respecting the Rights and Duties of Neutral Powers in Naval War*.—All the States represented at the Conference signed except the United States of America, China, Cuba, Spain, and Nicaragua. Some States made reservations. But the United States of America, China, and Nicaragua acceded later. At least twenty States have ratified, with or without reservations. Liberia acceded in 1914.

XIV. *Declaration prohibiting the Discharge of Projectiles and Explosives from Balloons*.—Only twenty-seven of the forty-four

States represented at the Conference signed. Germany, Chili, Denmark, Spain, France, Guatemala, Italy, Japan, Mexico, Montenegro, Nicaragua, Paraguay, Roumania, Russia, Serbia, Sweden, and Venezuela refused to sign, but Nicaragua acceded later. Liberia has acceded also. Fifteen States have ratified.

568b.¹ Important law-making stipulations are contained in the treaties of peace which were concluded at the close of the World War ; but these treaties form the subject of a separate part of this chapter. The International Air Convention, however, which was drawn up during the Peace Conference at Paris in 1919, is a pure law-making treaty. It was signed on October 13, 1919, by the British Empire, France, Italy, Belgium, Bolivia, Brazil, China, Cuba, Ecuador, Panama, Poland, Portugal, Roumania, Siam, and Uruquay, for the purpose of regulating air navigation in time of peace. Its principal clauses have already been considered.² It has not yet been ratified.

The Inter-
national
Air Con-
vention.

568c. Another law-making treaty drawn up at the Peace Conference at Paris in 1919 was the Convention for the Control of the Trade in Arms and Ammunition, which was signed at St. Germain on September 10, 1919,³ by the United States of America, Belgium, Bolivia, the

The Arms
Trade
Conven-
tion.

¹ The Declaration of London of February 26, 1909, concerning the Laws of Naval War, which was signed by all the ten Powers represented at the Conference of London—namely, Great Britain, Germany, the United States of America, Austria-Hungary, Spain, France, Italy, Japan, Holland, and Russia—was intended to be a law-making treaty of the greatest importance, and appeared as § 568b in the last edition of this book. But it failed to secure ratification ; and its fortunes during the World War are traced in vol. ii. On account of the opposition to its ratification which arose in England, the English literature on the declaration is very great. The more important books are the following: Bowles, *Sea Law and Sea Power*

(1910); Baty, *Britain and Sea Law* (1911); Bentwich, *The Declaration of London* (1911); Bray, *British Rights at Sea* (1911); Bate, *An Elementary Account of the Declaration of London* (1911); Civis, *Cargoes and Cruisers* (1911); Holland, *Proposed Changes in Naval Prize Law* (1911); Cohen, *The Declaration of London* (1911). See also Baty and Macdonell in the Twenty-sixth Report (1911) of the International Law Association, pp. 89, 115; Scott in *A.J.*, viii. (1914), pp. 274-329, 520-564; Westlake, *Papers*, pp. 633-675. There are also innumerable articles in periodicals.

² See above, § 197c.

³ Treaty Ser. (1919), No. 12, Cmd. 414.

British Empire, China, Cuba, Ecuador, France, Greece, Guatemala, Haiti, the Hedjaz, Italy, Japan, Nicaragua, Panama, Peru, Poland, Portugal, Roumania, the Serb-Croat-Slovene State, Siam, and Czecho-Slovakia. This convention abrogated all the provisions of former general treaties dealing with the trade in arms, and in particular the stipulations of the Brussels Act of July 2, 1890, dealing with this matter, in so far as they were binding between the Powers which are parties to the new convention. The signatory Powers, recognising that the dispersal of the stocks of arms and ammunition which were accumulated during the World War would constitute a danger to peace and public order, and that the existing treaties dealing with the arms traffic in certain regions no longer met present conditions, and should be extended to a wider area, agreed to this convention, which is to be revised at the end of seven years, if the Council of the League of Nations, acting by a majority, so recommends. The High Contracting Parties undertake to prohibit altogether the export of the arms and munitions of war specified in Article 1, except under licence; and such licences are only to be granted to meet the requirements of Governments. Arms the use of which is prohibited by International Law are not to be exported under any circumstances. Firearms and ammunition which do not fall within the classes enumerated in Article 1 are not to be exported, except under licence, to any part of the African continent (except Algeria, Libya, and South Africa), or to Transcaucasia, Persia, Gwadar, the Arabian Peninsula, and such continental parts of Asia as were part of the Turkish Empire before the World War, or to a maritime zone, including the Red Sea, the Gulf of Aden, the Persian Gulf, and the Sea of Oman. Elaborate provisions are laid down for the control and supervision of the trade in arms and ammunition within these pro-

hibited areas both by land and sea. A central international office, placed under the control of the League of Nations, is to be established, to collect documents relating to arms traffic.¹ Each party to the convention is to publish an annual report showing the number of export licences granted, and to send to the central office, and to the Secretary-General of the League, full information as to the quantities and destination of all arms and ammunition exported without licence. Other States which are members of the League are invited to accede to the convention; disputes arising under it, which cannot be settled by negotiation, are to be submitted to arbitration in conformity with the Covenant of the League. Germany,² Austria,³ and Bulgaria⁴ are bound to accept these arrangements, and Hungary and Turkey will probably be placed under a similar obligation, by the Treaties of Peace.

II

THE TREATIES OF PEACE AFTER THE WORLD WAR

§ 568*d*. The resettlement of the world after the war is not yet complete; but it is possible to give a short account of the treaties already concluded.

The Resettlement after the World War.

In the diplomatic correspondence before the armistice with Germany, general principles had been laid down for the restoration of peace; the main task of the Peace Conference at Paris was to apply them in detail. Victory had enabled the Allied and Associated Powers to deal separately with their enemies, and to exclude them from the negotiations; yet so many rival interests were at stake that conflict followed by compromise was inevitable. All the treaties are marked by compro-

¹ See above, § 471*d*.

² Article 126.

³ Article 373.

⁴ Article 290.

mises, and by questions left over for future compromise, or for settlement by the League of Nations.

These treaties fall into four groups: (1) Treaties of Peace already concluded with Germany, Austria, and Bulgaria, and still under consideration for Hungary and Turkey when this volume went to press; (2) Treaties between the Principal Allied and Associated Powers and smaller Allied Powers, providing for the protection of minorities, equitable treatment of commerce, and other matters. Treaties of this kind have already been made with Poland, Czecho-Slovakia, the Serb-Croat-Slovene State, and Roumania; (3) Treaties embodying local arrangements and made by the Principal Allied and Associated Powers, or at their suggestion. An example is the convention between Greece and Bulgaria, signed at Neuilly on November 27, 1919, respecting reciprocal emigration;¹ (4) General treaties not part of the settlement with the Central Powers. These—the convention revising the Berlin and Brussels Acts, and the Liquor Traffic, Arms Trade, and Air Conventions—have already been discussed.²

The
Treaty of
Peace
with
Germany.

568e. Of these treaties the first and most important is the Treaty of Peace with Germany, which was signed on June 28, 1919, at Versailles by the British Empire, the United States of America, France, Italy, Japan (the Principal Allied and Associated Powers), Belgium, Bolivia, Brazil, Cuba, Ecuador, Greece, Guatemala, Haiti, the Hedjaz, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Roumania, the Serb-Croat-Slovene State, Siam, Czecho-Slovakia, Uruguay (constituting with the Principal Powers mentioned above the Allied and Associated Powers), and Germany.³

¹ Misc., No. 3 (1920), Cmd. 589. This group cannot be discussed here.

² See above, §§ 564, 566, 568b, 568c, 197c.

³ Treaty Ser. (1919), No. 4, Cmd. 153; now out of print, but an en-

larged edition has been issued. A cheaper edition has been published unofficially (Henry Frowde and Hodder and Stoughton). China was named as a party to the treaty, but did not sign.

It came into force on January 10, 1920, between Germany, the Principal Allied and Associated Powers, excepting the United States, and a number of smaller Allied Powers, through the drawing-up of a 'procès-verbal'¹ recording the deposit of ratifications by these States.

The Treaty of Peace with Germany is divided into fifteen parts. Part I, the Covenant of the League of Nations, is the foundation of the treaty.² Part II draws the new frontiers of Germany. Part III regulates political questions between Germany and her neighbours. Germany consents to the abrogation of the treaties of April 19, 1839, which established the former status of *Belgium*, agrees to accede to new arrangements to be made by the Principal Allied and Associated Powers in concert with Belgium and Holland,³ recognises the full sovereignty of Belgium over the contested territory of Moresnet,⁴ and cedes to her Prussian Moresnet west of the road from Liège to Aix-la-Chapelle, and (subject, however, to a plébiscite and the ultimate decision of the League of Nations) Eupen and Malmédy. Germany adheres to the termination of the neutrality of *Luxembourg*, and accepts the arrangements which may be made by the Allied and Associated Powers.⁵ Germany is forbidden to fortify the *Left Bank of the Rhine*, and also a zone on the *Right Bank*.⁶ Germany renounces the government of the *Saar Basin* to the League of Nations as trustee. The League is to govern through a commission of five, which is to have most of the powers and duties of a sovereign, including the protection of the

¹ When the ratifications of a treaty are deposited or exchanged, a 'protocol' or 'procès-verbal,' recording the ceremony, is generally drawn up and signed. As to protocols, see above, § 491.

² See above, §§ 167*a-i*. As is there pointed out, in addition to its functions in the peaceful settlement of international disputes and the

promotion of international co-operation, the League has important and delicate duties to perform in the execution of the Treaties of Peace.

³ See above, § 99.

⁴ See above, § 171 (1).

⁵ See above, § 100.

⁶ See above, § 205, n. 3. See also the *Defence of France Treaties*, § 569*b*.

inhabitants abroad. But their existing nationality is unaffected. There are to be no fortifications, and no military service. The coal-mines within the Basin Germany cedes absolutely to France. At the end of fifteen years, after a plébiscite, the League of Nations is to determine whether the whole or a part of the Basin should be united with France, or with Germany, or maintained permanently under the treaty régime. Germany is to repurchase the coal-mines in any part of the Basin then reunited with her. *Alsace-Lorraine* is restored to French sovereignty as from the armistice. Germany acknowledges the independence of *Austria*, and agrees that it shall be inalienable, except with the consent of the Council of the League of Nations. Germany recognises the independence of *Czecho-Slovakia*, a new State consisting of Bohemia, Moravia, part of Silesia, Slovakia, and the autonomous territory of the Ruthenians, and cedes to it a portion of Silesian territory.¹ Germany also recognises the independence of restored ² *Poland*, and cedes to it West Prussia and Posnania. In Upper Silesia, and in Allenstein and certain other parts of East Prussia, a plébiscite is to be held, and the Principal Allied and Associated Powers will then decide between the claims of Germany and Poland. There is to be freedom of transit across Poland between East Prussia and the rest of Germany.³ Germany renounces *Memel*, of which no disposition is made. *Danzig* is to be established as a Free City, under the protection of the League of Nations ; but its foreign relations, many of its public services, and the diplomatic protection of its citizens abroad are to be in the hands of Poland.⁴ A new frontier is to be fixed between Denmark and Germany in *Schleswig*, having regard

¹ Not to be confounded with Upper Silesia.

² See above, § 45.

³ The Polish corridor of West

Prussia severs East Prussia from the rest of Germany.

⁴ See above, § 93.

to the wishes of the population.¹ The fortifications of *Heligoland* and *Dune* are to be destroyed, and not to be reconstructed. Germany may not instal guns to command the sea passages between the North Sea and the Baltic. Germany agrees to the inalienable independence of all the territories of the former *Russian Empire*, accepts the abrogation of the Treaties of Brest Litovsk,² and of all her other treaties with the so-called Bolshevik Government, and agrees to any arrangements which the Allied and Associated Powers may make for any of these territories.

By Part iv Germany renounces all territorial rights outside her new European frontiers, and accepts the measures which may be taken by the Principal Allied and Associated Powers. In particular, she renounces her oversea possessions, which are, for the most part, to be administered by an Allied Power as mandatory on behalf of the League of Nations,³ renounces all rights under two conventions with France⁴ relating to *Equatorial Africa*, and will observe the conventions made by any Allied Powers with regard to the trade in arms and spirits, and to revise the Berlin and Brussels Acts.⁵ The leases of the German concessions at *Hankow* and *Tientsin* are abrogated;⁶ and German rights in *Shantung* are renounced in favour of Japan, which has offered to negotiate with China for retrocession.⁷ Germany recognises the abrogation of all her pre-war treaties with *Siam* and *Liberia*, and renounces all benefits under the Algeciras Act of April 7, 1906, and other treaties relating to *Morocco*,⁸ and under the régime

¹ See above, § 289, and Oakes and Mowat, *The Great European Treaties of the Nineteenth Century* (1918), pp. 186 and 247, for previous episodes in the Schleswig question. That book answers many historical questions raised by the Treaties of Peace.

² See above, § 50a.

³ See above, § 167p.

⁴ Signed on November 4, 1911, and September 28, 1912.

⁵ See above, §§ 564, 566, 568c.

⁶ See above, § 171 (3).

⁷ See above, § 171 (3), and *The Times*, January 26 and 29, 1920.

⁸ See above, § 50.

of the Capitulations.¹ She recognises the British protectorate over *Egypt*,² the abrogation of all her treaties with Egypt, and of the Capitulations.³ She consents to the transfer to Great Britain of the powers of the Sultan under the Suez Canal Convention.⁴ She abandons all claims to rights or interests in *Turkey* and *Bulgaria*.

Part v contains the military, naval, and air clauses. In order to render possible a general limitation of armaments, the German army is to be reduced to 100,000 men, not recruited by compulsory service. The German navy is to be reduced to six battleships and a corresponding number of other war-vessels, and the construction or acquisition of any submarine, even for commercial purposes, is forbidden. The armed forces of Germany may not include any military or naval air forces. Germany may not accredit military, naval, or air missions to any foreign country. Those restrictions under this Part, for the execution of which a time-limit is prescribed, are to be carried out under the control of Inter-Allied commissions; and as to the others, so long as the treaty remains in force, Germany undertakes to give every facility for any investigation which a majority of the Council of the League of Nations may consider necessary.

Part vi provides for the repatriation of prisoners of war,⁵ and the maintenance of graves.

Under Part vii the Allied and Associated Powers publicly arraign the former German Emperor for a supreme offence against international morality and the sanctity of treaties; and the German Government recognises their right to bring to trial persons accused of having committed acts in violation of the laws and customs of war.⁶

¹ See above, §§ 318, 418, 439.

² See above, § 91.

³ See above, § 441.

⁴ See above, § 183.

⁵ See vol. ii. § 132.

⁶ See vol. ii. § 251-257.

Under Part VIII Germany accepts responsibility for herself and her Allies for all the loss and damage which the Allied and Associated Governments and their subjects suffered in consequence of the war imposed upon them; but they recognise that the resources of Germany are not adequate to make complete reparation. So categories of damage are specified, for which reparation is to be made, and machinery is provided to assess the amount payable (the Reparation Commission), and to determine whether this amount is to be paid in cash, raw materials, services, or otherwise, and how much is to be credited to Germany for transfers of property under the treaty.

Part IX establishes the priority of the various charges on the assets and revenues of Germany, stipulates the currency for payment, provides for the apportionment of the German pre-war public debt between Germany and the States to which German territory is ceded,¹ and for payment for the public property acquired by them, and contains articles to eliminate German influence over international financial or economic organisations, and public services, in certain foreign countries.

Part X contains clauses of limited duration prohibiting Germany from giving preference to the commerce of any other *foreign* State in import or export duties, or by any other means, to the disadvantage of the Allied and Associated Powers. Their vessels are to enjoy most-favoured-nation treatment² in German territorial waters as regards sea fishing, coasting trade, and towage. Their subjects are not to suffer any restrictions in Germany not equally applicable to all *aliens*, nor any restrictions first imposed since July 1914 which are not also imposed upon *Germans*. There are also provisions for the prevention of unfair competition, for

¹ See above, § 84.

² As to the meaning of most-

favoured-nation treatment, see below, § 580.

free access to the German courts, and for the appointment of consuls by the Allied and Associated Powers.¹ The multilateral treaties of an economic or technical character which are to be again applied between Germany and those of the Allied and Associated Powers party thereto are enumerated,² and there are stipulations as to the abrogation or reintegration of bilateral treaties.³ Detailed arrangements are made for the readjustment of private property, rights and interests between German subjects or firms and those of Allied or Associated Powers.

Part XI contains articles of limited duration with regard to aerial navigation.⁴

Part XII provides for freedom of transit through German territory, either by rail, navigable waterway, or canal, to persons, goods, vessels, carriages, wagons, and mails coming from, or going to, Allied and Associated States. No discriminatory or preferential charges are to be imposed. The subjects of Allied and Associated States, their vessels and property, are to enjoy in the ports, and on the inland routes, of Germany the same treatment as German subjects, their vessels and property. The free zones existing in German ports before the war are to be maintained under a special régime provided by the treaty. On German railways goods coming from Allied and Associated States and going to Germany, and goods in transit through Germany, are to enjoy the most favourable treatment applied to goods of the same kind on any German lines. These stipulations are to be subject to revision by the Council of the League of Nations after January 1925 ; but failing such revision, no Allied or Associated State can claim the benefit of them after that date without according

¹ As to consuls, see above, §§ 418-438.

² See below, § 581*b*.

³ See §§ 549, 552, and vol. ii. § 99.

⁴ Germany may not at present accede to the International Air Convention, § 197*c*.

reciprocity.¹ Without prejudice to these special provisions, Germany agrees to accede to any international conventions regarding transit, waterways, ports, or railways, which may be concluded by the Allied and Associated Powers, with the approval of the League of Nations, before January 1925. This Part also provides a régime for the Kiel Canal ² and for international rivers,³ and special clauses for the Elbe, Oder, Niemen, Danube, Rhine, and Moselle.⁴ Moreover, Germany is to lease to the Czecho-Slovak State for ninety-nine years free zones in the ports of Hamburg and Stettin.⁵

Part XIII is the International Labour Convention.⁶

Under Part XIV, as a guarantee for the execution of the treaty, the German territory to the west of the Rhine, together with the bridgeheads, will be occupied by Allied and Associated troops for fifteen years; but if the treaty is faithfully carried out, the occupied area will be gradually restricted.

Part XV deals with miscellaneous questions, such as the neutralised zone of Savoy,⁷ the relationship between France and Monaco,⁸ and Prize Court decisions.⁹

568*f*. The Treaty of Peace with Austria was signed on September 10, 1919, at St. Germain, by the British Empire, the United States of America, France, Italy, and Japan, by Belgium, China, Cuba, Greece, Nicaragua, Panama, Poland, Portugal, Siam, and Czecho-Slovakia, and by Austria.¹⁰ It has not yet ¹¹ come into force. This treaty is in form similar to the German treaty, and many of its clauses are identical.

¹ But the period during which reciprocity cannot be demanded may be prolonged by the Council of the League.

² See above, § 183*a*.

³ See above, §§ 178, 459.

⁴ See above, §§ 178, 459.

⁵ As to leases of territory, see above, § 171 (3).

⁶ Discussed below, § 568*i*.

⁷ See above, § 207.

⁸ See above, § 93.

⁹ See vol. ii. § 192.

¹⁰ Treaty Ser. (1919), No. 11, Cmd. 400. Roumania acceded later. The Serb-Croat-Slovene State acceded on December 5, 1919. (See Treaty Ser. (1920), No. 8, Cmd. 638.)

¹¹ May 1920.

The
Treaty of
Peace
with
Austria.

Part I is the Covenant of the League. Part II draws the frontiers of Austria, which embrace the predominantly German-speaking territories of the old Austria-Hungary. Part III provides for readjustments with Italy, for Austrian recognition of the new Serb-Croat-Slovene State, and of Czechoslovakia, for a plébiscite in the Klagenfurt area, and the renunciation in favour of Roumania of such part of Bukovina as is assigned to her. It also contains provisions analogous to those in the German treaty relating to Belgium, Luxemburg, Schleswig, Turkey, Bulgaria, Russia, and the Russian States. Part IV deals with Austrian interests outside Europe—in Morocco, Egypt,¹ Siam, China. Part V restricts the Austrian army to 30,000 men, and the navy to three river patrol boats. No military or naval aircraft are permitted. There are provisions with regard to submarines, missions, Inter-Allied commissions of control, and investigations by the Council of the League. Part VI deals with prisoners of war² and the maintenance of graves. Part VII deals with the punishment of war crimes.³ Part VIII contains the reparation clauses; Part IX the clauses determining the priority of charges established by the treaty, the apportionment of the public debt of old Austria-Hungary, and the liquidation of the Austro-Hungarian Bank. Part X prohibits commercial discrimination, unfair competition, and victimisation of subjects of the Allied and Associated Powers; and deals with consuls, treaties,⁴ and the readjustment of private rights. Part XI deals with air navigation. Part XII provides for freedom of transit, freedom of navigation on inland waterways, free access for Austria to the Adriatic, and freedom of navigation on the river

¹ See above, 91, 183, 441.

² See vol. ii. § 132.

³ See vol. ii. §§ 251-257.

⁴ See below, § 581b, and vol. ii. § 99.

system of the Danube.¹ It also contains stipulations concerning railways, telegraphs, and telephones. Part XIII is the Labour Convention ;² and Part XIV contains miscellaneous provisions.

568*g*. The Treaty of Peace with Bulgaria was signed on November 27, 1919, at Neuilly, by the Principal Allied and Associated Powers, Belgium, China, Cuba, Greece, the Hedjaz, Poland, Portugal, the Serb-Croat-Slovene State, Siam, Czecho-Slovakia, and Bulgaria.³ Roumania acceded later. It has not yet (May 1920) come into force.

Part I is the Covenant of the League ; Part II draws the frontiers. Part III readjusts the relations of Bulgaria with the Serb-Croat-Slovene State and Greece, provides for the renunciation of parts of Thrace at that time unallocated, and for an economic outlet for Bulgaria to the Ægean. It also contains articles by which Bulgaria concurs in the general resettlement. Part IV restricts the Bulgarian army to 20,000 men, and the navy to ten small craft. Bulgaria is to keep no military or naval air forces. Part V deals with prisoners of war⁴ and graves ; Part VI with the punishment of war crimes ;⁵ Part VII with reparation ; Part VIII with the priority of charges and the apportionment of public debt ; Part IX with commercial relations, treaties,⁶ consular jurisdiction,⁷ and private rights ; Part X with air navigation ; Part XI with freedom of transit, of navigation on inland waterways and in ports and on the Danube,⁸ telegraphs and telephones, and transport by rail. Part XII is the Labour Convention,⁹ and Part XIII contains miscellaneous provisions.

568*h*. The treaties between the Principal Allied and

¹ See above, §§ 178, 459.

² See below, § 568*i*.

³ Treaty Ser. (1920), No. 5, Cmd. 522.

⁴ See vol. ii. § 132.

⁵ See vol. ii. §§ 251-257.

⁶ See below, § 581*b*, and vol. ii. § 99.

⁷ See above, §§ 318, 439.

⁸ See above, §§ 178, 459.

⁹ See below, § 568*i*.

The
Treaty of
Peace
with
Bulgaria.

Treaties
with the
Smaller
Allied
Powers
and the
Protec-
tion of
Minor-
ities.

Associated Powers and Poland, Czecho-Slovakia, the Serb-Croat-Slovene State, and Roumania respectively,¹ deal with such questions as the equitable treatment of foreign commerce, consuls, customs duties, freedom of transit, freedom of navigation on the Vistula and the Pruth, and accession to general treaties. But it is only possible to discuss here the important clauses relating to the protection of minorities.

As has already been stated,² when, at the Berlin Congress in 1878, the Great Powers accorded recognition to Montenegro, Serbia, and Roumania, they made it a condition that these States should comply with certain principles of government. But recognition once given, is incapable of withdrawal; and therefore the legal effect of conditional recognition is merely to impose upon the State accepting it a duty to fulfil the condition. At the end of the World War the principal victorious Powers sought the same result by the more direct means of concluding a series of treaties with the States concerned; and provisions for the protection of minorities occur in the treaties with Poland, Czecho-Slovakia, the Serb-Croat-Slovene State, Roumania, Austria and Bulgaria, and probably in the treaties still under consideration.

Under these clauses all inhabitants are to enjoy full and complete protection of life and liberty, without distinction of birth, nationality, language, race or religion, and shall be entitled to the free exercise of any religion. Provision is made that citizenship shall

¹ The treaty with Poland was signed on June 28, 1919, and came into force on January 10, 1920. See Treaty Ser. (1919), No. 8, Cmd. 223. The treaties with Czecho-Slovakia and the Serb-Croat-Slovene State were signed on September 10, 1919, by all the parties except the Serb-Croat-Slovene State, which acceded on December 5, 1919, and are to come into force at the same time as

the Austrian treaty. See Treaty Ser. (1919), Nos. 20 and 17, Cmd. 479 and 461. The treaty with Roumania was signed on December 9, 1919, and is also to come into force at the same time as the Austrian treaty. See Treaty Ser. (1920), No. 6, Cmd. 588. These last three treaties have not yet been ratified.

² See above, § 73.

not be denied to genuine residents of whatever minority, and by this means it is hoped to avoid a repetition of the tactics adopted to evade the Treaty of Berlin.¹ All citizens are to enjoy equality before the law, the same civil and political rights, the right to use any language in public or in private, and the right to establish schools and religious and charitable institutions. All these stipulations constitute obligations of international concern under the guarantee of the League of Nations. They can only be modified by a majority of the Council, and disputes arising out of them shall, upon the application of an aggrieved party, be submitted to the Permanent Court of International Justice.² Any member of the Council of the League is authorised to call attention to any infraction, and thereupon the Council may take such steps as it thinks fit.

These treaties also contain clauses for the benefit of particular minorities. Thus the Polish and Roumanian treaties contain special stipulations in favour of the Jews.

568*i*. Article 23(*a*) of the Covenant of the League of Nations provides that the member-States shall establish and maintain organisations to secure fair and humane conditions of labour.³ This obligation has been carried out by the Labour Part of the Treaties of Peace, which establishes a Permanent Labour Organisation, consisting of a General Conference and of an International Labour Office, controlled by a governing body, and conducted by a director.

The International Labour Convention.

All States which are, or may become, members of the League of Nations are members of the International Labour Organisation, and each selects four delegates (two being Government delegates, the third representing the employers, and the fourth the workpeople)

¹ See above, § 312.

² See above, 476*b*.

³ See above, §§ 167*h* and 167*q*.

to attend the General Conference, which meets at least once a year.

The main function of a General Conference is to draw up recommendations to be submitted to the member-States for consideration, with a view to effect being given to them by national legislation or otherwise, and draft conventions which must be submitted to the member-States for ratification. It will be seen, therefore, that the Conference has no legislative powers. Every recommendation or draft convention which is adopted by a two-thirds majority on the final vote is to be communicated to each member-State by the Secretary-General of the League of Nations. Thereupon, each member-State undertakes to bring it before the authorities competent to take the requisite action; and if it is a recommendation, it will inform the Secretary-General what action has been taken; if it is a draft convention, and it secures ratification, it will communicate the formal ratification to the Secretary-General for registration, and will give effect to its provisions. If any member-State fails to fulfil these obligations, any other member-State may bring the matter before the Permanent Court of International Justice, whose decision shall be final. But if no action is taken by the competent authorities on a recommendation, or if a convention fails to secure ratification, the obligations of the member-State concerned are at an end. Conventions are only binding on States which ratify them.¹

The International Labour Office, established at the seat of the League of Nations as part of its organisation, is under the control of a governing body of twenty-four persons. Twelve are nominated by Govern-

¹ As to the provisions with regard to Federal States, and colonies, protectorates and possessions which are

not fully self-governing, see, for example, the Treaty of Peace with Germany, Articles 405 and 421.

ments; six are elected by the delegates at the Conference representing employers; and six by those representing workers. The governing body elects its own chairman, regulates its own procedure, and fixes its meetings.

It also appoints a director, who, subject to its instructions, is responsible for the efficient conduct of the Labour Office.

The principal functions of the Labour Office, in addition to those assigned to it by the Conference, are:

(1) The collection and distribution of information relating to industrial life and labour.

(2) The examination of subjects proposed for discussion by the Conference.

(3) The publication of a periodical paper.

(4) The receipt of annual reports from the member-States on the measures taken to give effect to the conventions to which they are party.

(5) Duties in connection with complaints.

Two kinds of complaints are dealt with by the Convention, namely (a) complaints against a member-State by an industrial association of employers or workers, and (b) complaints by one member-State against another.

(a) If an industrial association lodges a complaint with the Labour Office that a member-State has failed to secure the effective observance of any convention to which it is a party, the governing body may communicate it to the Government of the member-State concerned, and invite a statement in reply. If no reply is made, or if the reply appears to the governing body to be unsatisfactory, it may publish the complaint, together with the reply, if any.

(b) If, on the other hand, one member-State lodges a complaint with the Labour Office that another member-State is not securing effective observance of a conven-

tion which both have ratified,¹ the governing body, with or without previous communication with the member-State affected by the complaint, may apply to the Secretary-General of the League to nominate a Commission of Inquiry, constituted in accordance with the Labour Convention.

The Commission of Inquiry is to prepare a report, embodying its findings and recommendations. This report is to be published, and the member-State affected by it can either accept the recommendations, or appeal to the Permanent Court of International Justice,² whose decision shall be final. If any member-State neither appeals, nor carries out the recommendations of the Commission, or, after appeal, fails to carry out the decision of the Court, any other member-State may take against it the economic measures indicated in the report or the decision, as the case may be; and may continue to apply them until a Commission of Inquiry, constituted as before, finds that the defaulting State has taken the necessary steps.

Disputes arising out of this Convention, or any convention concluded under it, are to be referred to the Permanent Court of International Justice.

The first meeting of the General Conference was held at Washington from October 29 to November 29, 1919,³ and six draft conventions, concerning (1) the hours of work in industrial undertakings, (2) unemployment, (3) the employment of women before and after childbirth, (4) the employment of women during the night, (5) the minimum age for admission of children to industrial employment, and (6) the night work of young persons; and six recommendations, concerning (1) unemployment, (2) foreign workers, (3) anthrax, (4) the protection

¹ Or if a delegate to the Conference lodges such a complaint, or if the governing body, of its own motion,

desires an investigation.

² See above, § 476b.

³ See *Parl. Paper*, Cmd. 627.

of women and children against lead-poisoning, (5) Government Health Services, and (6) the Berne White Phosphorus Convention of 1906,¹ were adopted. The States selected to nominate Government representatives on the governing body were: Belgium, France, Great Britain, Italy, Japan, Germany, Switzerland, Spain, Argentina, Canada, Poland, and, pending the advent of the United States, Denmark.²

III

ALLIANCES

Grotius, ii. c. 15—Vattel, iii. §§ 78-102—Twiss, i. § 246—Taylor, §§ 347-349—Wheaton, §§ 278-285—Bluntschli, §§ 446-449—Heffter, § 92—Geffcken in *Holtzendorff*, iii. pp. 115-139—Ullmann, § 82—Bonfils, Nos. 871-881—Despagnet, No. 459—Mérignhac, ii. p. 683—Nys, iii. pp. 531-534—Pradier-Fodéré, ii. Nos. 934-967—Rivier, ii. pp. 111-116—Calvo, iii. §§ 1587-1588—Fiore, ii. No. 1094, and *Code*, Nos. 898-904—Martens, i. § 113—Rolin-Jaequemyns in *R.I.*, xx. (1888), pp. 5-35—Erich, *Ueber Allianzen und Allianzverhältnisse nach heutigem Völkerrecht* (1907)—Lammasch, *Das Völkerrecht nach dem Kriege* (1917), pp. 159-171—Rehm in *Z.I.*, xxvi. (1915), pp. 118-152.

§ 569. Alliances, in the strict sense of the term, are treaties of union between two or more States, for the purpose of defending each other against an attack in war, or of jointly attacking third States, or for both purposes. The term 'alliance' is, however, often made use of in a wider sense, and it comprises in such cases treaties of union for various purposes. Thus, the so-called 'Holy Alliance,' concluded in 1815 between the Emperors of Austria and Russia and the King of Prussia, and afterwards joined by almost all the sove-

Concep-
tion of
Alliances.

¹ See below, § 587.

² See *The Times*, November 27, 1919.

reigns of Europe, was a union for such vague purposes that it cannot be called an alliance in the strict sense of the term.

History relates innumerable alliances between the several States. They have always played an important part in politics. The triple alliance¹ between Germany, Austria, and Italy made in 1879 and 1882, renewed in 1912, and denounced by Italy in 1915, the alliance between Russia and France made in 1899, and that made between Great Britain and Japan in 1902, and renewed in 1905 and 1911, are illustrative examples.

Con-
tingent
Defence of
France
Treaties.

569*b*. During the Peace Conference at Paris after the World War, on June 28, 1919, Great Britain signed a treaty with France by which she undertook, subject to the consent of Parliament, and provided that a similar obligation was entered into by the United States of America, to support France in the case of an unprovoked movement of aggression being made against France by Germany. It was provided that the treaty was to be submitted to the Council of the League of Nations, and was to be recognised by the Council, acting by a majority, as an engagement consistent with the Covenant; it was to continue in force until, on application of one of the parties, the Council, acting by a majority, agreed that the League itself afforded sufficient protection. It was to impose no obligation upon any of the British Dominions until approved by the Parliament of the Dominion concerned. This treaty was approved by the British Parliament and the French Chambers, and was ratified on November 20, 1919. But it has not come into force, because the treaty in similar terms entered into between the United States of America and France on the same day has not been ratified. The Anglo-French Defence of France Treaty is contingent upon the Franco-American Treaty,

¹ See Singer, *Geschichte des Dreibundes* (1914).

and will only come into force if, and when, the latter is ratified.¹

§ 570. Subjects of alliances are said to be full sovereign States only. But the fact cannot be denied that alliances have been concluded by States under suzerainty. Thus, the convention of April 16, 1877, between Roumania, which was then under Turkish suzerainty, and Russia, concerning the passage of Russian troops through Roumanian territory in case of war with Turkey, was practically a treaty of alliance.² Thus, further, the former South African Republic, although, at any rate according to the views of the British Government, a half sovereign State under British suzerainty, concluded an alliance with the former Orange Free State by treaty of March 17, 1897.³

Parties to
Alliances.

A neutralised State can be the subject of an alliance for the purpose of defence, whereas the entrance into an offensive alliance on the part of such State would involve a breach of its neutrality.

§ 571. As already mentioned, an alliance may be offensive or defensive, or both. All three kinds may be either general alliances, in which case the allies are united against any possible enemy whatever, or particular alliances against one or more particular enemies. Alliances, further, may be either permanent or temporary; in the latter case they expire with the period of time for which they were concluded. As regards offensive alliances, it must be emphasised that they are valid only when their object is not immoral,⁴ and

Different
Kinds of
Alliances.

¹ Treaty Ser. (1919), No. 6, Cmd. 221. Of course, it may be that, if the Franco-American Treaty is not ratified, Great Britain will enter into a new Defence of France Treaty. Mr. Bonar Law stated in the House of Commons, on behalf of the British Government, on November 21, 1919: 'As far as any obligation of this country is concerned—I do not say that another situation will not make

a new condition of affairs—it is contingent upon the United States Government undertaking the same obligation.' See *The Times*, November 22, 1919.

² See Martens, *N.R.G.*, 2nd Ser. iii. p. 182.

³ See Martens, *N.R.G.*, 2nd Ser. xxv. p. 327.

⁴ See above, § 505.

all alliances which are inconsistent with the Covenant of the League of Nations are *ipso facto* abrogated, as between members of the League, by Article 20 of the Covenant. The members solemnly undertake that they will not enter into any new engagements inconsistent with the Covenant, and will take immediate steps to procure their release from any such obligations already assumed. However, international engagements for securing the maintenance of peace are valid.¹

Condi-
tions of
Alliances.

§ 572. Subject, as between members of the League of Nations, to the provisions of the Covenant, alliances may contain all sorts of conditions. The most important are the conditions regarding the assistance to be rendered. It may be that assistance is to be rendered with the whole, or a limited part, of the military and naval forces of the allies, or with the whole, or a limited part, of their military forces only, or with the whole, or a limited part, of their naval forces only. Assistance may, further, be rendered in money only, so that one of the allies is fighting with his forces, while the other supplies a certain sum of money for their maintenance. A treaty of alliance of such a kind must not be confounded with a simple treaty of subsidy. If two States enter into a convention that one of the parties shall furnish the other permanently, in time of peace and war, with a limited number of troops, in return for a certain annual payment, such a convention is not an alliance, but a treaty of subsidy only. But if two States enter into a convention that, in case of war, one of the parties shall furnish the other with a limited number of troops, be it in return for payment or not, such a convention really constitutes an alliance. For every convention concluded for the purpose of lending succour in time of war implies an alliance. It is for this reason that the above-mentioned ² treaty of 1877

¹ Article 21.

² See above, § 570.

between Russia and Roumania, concerning the passage of Russian troops through Roumanian territory in case of war against Turkey, was really a treaty of alliance.

§ 573. *Casus fœderis* is the event upon the occurrence of which it becomes the duty of one of the allies to render the promised assistance to the other. Thus, in case of a defensive alliance, the *casus fœderis* occurs when war is declared or commenced against one of the allies. Treaties of alliance very often define precisely the event which shall be the *casus fœderis*, and then the latter is less exposed to controversy. But, on the other hand, there have been many alliances concluded without such precise definition, and, consequently, disputes have arisen later between the parties as to the *casus fœderis*.¹

That the *casus fœderis* is not influenced by the fact that a State, after having entered into an alliance, concludes a treaty of general arbitration with a third State, has been pointed out above, § 522.

IV

TREATIES OF GUARANTEE AND OF PROTECTION

Vattel, ii. §§ 235-239—Hall, § 113—Phillimore, ii. §§ 56-63—Twiss, i. § 249—Halleck, i. p. 304—Taylor, §§ 350-353—Wheaton, § 278—Bluntschli, §§ 430-439—Heffter, § 97—Geffcken in *Holtzendorff*, iii. pp. 85-112—Liszt, § 22—Ullmann, § 83—Fiore, *Code*, Nos. 792-796—Bonfils, Nos. 882-893—Despagnet, No. 461—Mérignhac, ii. p. 681—Nys, ii. pp. 516-520—Pradier-Fodéré, ii. Nos. 969-1020—Rivier, ii. pp. 97-105—Calvo, iii. §§ 1584-1585—Martens, i. § 115—Neyron, *Essai historique et politique sur les Garanties* (1779)—Milovanovitch, *Des Traités de Garantie en Droit international* (1888)—Erich, *Ueber Allianzen und Allianzverhältnisse nach heutigem Völkerrecht* (1907)—Quabbe, *Die völkerrechtliche Garantie* (1911)—Grosch, *Der Zwang im Völkerrecht* (1912), pp. 66-75—Idman, *Le Traité de Garantie* (1913)—Sanger and Norton, *England's Guarantee to Belgium and Luxemburg* (1915)—Lammasch, *Das Völkerrecht nach dem Kriege* (1917), pp. 159-171—Erich in *Z. V.*, vii. (1913), pp. 452-476.

¹ Thus, during the World War, Italy declined to recognise that a *casus fœderis* had occurred under the Triple Alliance (see *A.J.*, viii. (1914), Supplement, p. 368), and

Greece refused to recognise that a *casus fœderis* had occurred under the Greco-Serbian Treaty of 1913 (see *A.J.*, xii. (1918), p. 312).

Concep-
tion and
Objects of
Guarantee
Treaties.

§ 574. Treaties of guarantee are conventions by which one of the parties engages to do what is in its power to secure a certain object to the other party. Guarantee treaties may be mutual or unilateral. They may be concluded by two States only, or by a number of States jointly. In the latter case, the single guarantors may give their guarantee severally, or collectively, or both. And the guarantee may be for a certain period of time only, or permanent. Guarantee treaties are admissible according to Article 21 of the Covenant of the League of Nations, provided that they are not inconsistent with its terms. Indeed Article 10 of the Covenant itself constitutes a treaty of guarantee.

The possible objects of guarantee treaties are numerous.¹ It suffices to give the following chief examples: the performance of a particular act on the part of a certain State, as the discharge of a debt,² or the cession of a territory; certain rights belonging to a State; the undisturbed possession of the whole, or a particular part, of its territory; a particular form of constitution; a certain status, as permanent neutrality,³ or independence,⁴ or integrity;⁵ particular dynastic

¹ The important part that treaties of guarantee play in politics may be seen from a glance at Great Britain's guarantee treaties. See Munro, *England's Treaties of Guarantee*, in the *Law Magazine and Review*, vi. (1881), pp. 215-238.

² It is important to state that the guarantee by one or more States of the discharge of a debt concerns only a debt between two States, and not a debt of a State to private individuals. Although the latter may likewise be guaranteed by one or more States, such a guarantee is as little an international treaty as the guaranteed loan itself is an obligation according to International Law. See Meyer-Balding in *Z.I.*, xxvi. (1916), pp. 387-426, and the literature there quoted.

³ See above, § 95.

⁴ Thus Great Britain, France, and Russia guaranteed, by the treaty with Denmark of July 13, 1863, the independence (but also the monarchy) of Greece (Martens, *N.R.G.*, xvii. pt. ii. p. 79). The United States of America has guaranteed the independence of Cuba by the Treaty of Havana of May 22, 1903 (Martens, *N.R.G.*, 2nd Ser. xxxii. p. 79); of Panama by the Treaty of Washington of November 18, 1903 (Martens, *N.R.G.*, 2nd Ser. xxxi. p. 599); and of Haiti by Article 14 of the Treaty of Port-au-Prince of September 16, 1915 (see *A.J.*, x. (1916), Supplement, p. 234).

⁵ Thus the integrity of Norway was guaranteed by Great Britain, Germany, France, and Russia by the Treaty of Christiania of November 2, 1907 (see Martens, *N.R.G.*, 3rd Ser.

succession ; the fulfilment of a treaty concluded by a third State.

§ 575. The effect of guarantee treaties is the imposi- Effect of
Treaties
of Guar-
antee.
tion of the duty upon the guarantors to do what is in their power in order to secure the guaranteed objects. The compulsion to be applied by a guarantor for that purpose depends upon the circumstances ; it may eventually be war. But the duty of the guarantor to render, even by compulsion, the promised assistance to the guaranteed State depends upon many conditions and circumstances. Thus, first, the guaranteed State must request the guarantor to render assistance. When, for instance, the possession of a certain part of its territory is guaranteed to a State which, after its defeat in a war with a third State, agrees, as a condition of peace, to cede the territory in question to the victor without having requested the intervention of the guarantor, the latter has neither a right nor a duty to interfere. Thus, secondly, the guarantor must at the critical time be able to render the required assistance. When, for instance, its hands are tied through waging war against a third State, or when it is so weak through internal troubles, or other factors, that its interference would expose it to a serious danger, it is not bound to fulfil the request for assistance. So too, when the guaranteed State has not complied with previous advice given by the guarantor as to the line of its behaviour, it is not the guarantor's duty to render assistance afterwards.

It is impossible to state all the circumstances and conditions upon which the fulfilment of the duty of the guarantor depends, as every case must be judged upon its own merits. And it is certain that, more frequently

i. p. 14, and ii. p. 9), a condition of this integrity being that Norway did not cede any part of her territory

to any foreign Power. See Morgent-
stierne in the *Law Quarterly Review*,
xxi. pp. 389-396.

than in other cases, changes in political constellations, and the general development of events, may involve such vital change of circumstances as to justify¹ a State in refusing to interfere in spite of a treaty of guarantee. It is for this reason that treaties of guarantee to secure permanently a certain object to a State are naturally of a more or less precarious value to the latter. The practical value, therefore, of a guarantee treaty, whatever may be its formal character, would, as a rule, seem to extend only to the early years of its existence, while the original conditions still obtain.

Effect of
Collective
Guaran-
tee.

§ 576. In contradistinction to treaties constituting a guarantee on the part of one or more States severally, the effect of treaties constituting a *collective* guarantee on the part of several States requires special consideration. On July 4, 1867, Lord Derby maintained² in the House of Lords, concerning the collective guarantee by the Powers of the neutralisation of Luxemburg, that, in case of a collective guarantee, each guarantor had only the duty to act according to the treaty when all the other guarantors were ready to act likewise; that, consequently, if one of the guarantors themselves should violate the neutrality of Luxemburg, the duty to act according to the treaty of collective guarantee would not accrue to the other guarantors. This opinion, although approved by Viscount Grey, then British Secretary of State for Foreign Affairs, at the outbreak of the World War in 1914, is certainly not correct,³ and I do not know of any publicist who would, or could, approve of it.⁴ There ought to be no doubt that, in a case of collective guarantee, one of the guarantors

¹ See above, § 539.

² *Hansard*, vol. 183, p. 150; see Sanger and Norton, *op. cit.*, pp. 77-90.

³ See Hall, § 113; Bluntschli,

§ 440; and Quabbe, *op. cit.*, pp. 149-159.

⁴ See now, however, Smith, *International Law*, 5th ed. (1918), p. 144.

alone cannot be considered bound to act according to the treaty of guarantee. For a collective guarantee can only have the meaning that the guarantors should act in a body. But if one of the guarantors themselves violates the object of his own guarantee, the body of the guarantors remain, and it is certainly their duty to act against such faithless co-guarantor. If, however, the majority,¹ and therefore the body of the guarantors, were to violate the very object of their guarantee, the duty to act against them would not accrue to the minority.²

Different, however, is the case in which a number of Powers have *collectively and severally* guaranteed a certain object. Then, not only as a body but also individually, it is their duty to interfere in any case of violation of the object of guarantee.

And it must be emphasised that the mere fact that a number of States guarantee a certain object to another State in one and the same treaty does not make the guarantee a *collective* guarantee; for a guarantee is collective only when it is expressly stated to be so, by the use of the terms 'collective' or 'joint' or the like. However this may be, since the British Foreign Office defends a peculiar construction of the term 'collective guarantee,' Powers must in future be careful to define their intention, in case they enter into a treaty of collective guarantee. No such treaty has been concluded since 1867.

§ 576a. Different from real guarantee treaties are Pseudo-Guarantees such treaties as declare the policy of the parties with regard to the maintenance of their territorial *status quo*. Whereas treaties guaranteeing the maintenance of the territorial *status quo* engage the guarantors to do what

¹ See against this statement Quabbe, *op. cit.*, p. 158.

Law, during its meeting at Christiania in 1912, informally discussed treaties of guarantee. See *Annuaire*, xxv. (1912), p. 638.

² The Institute of International

they can to maintain such *status quo*, treaties declaring the policy of the parties with regard to the maintenance of their territorial *status quo* do not contain any legal engagements, but simply state the firm resolution of the parties to uphold the *status quo*. In contradistinction to real guarantee treaties, such treaties declaring the policy of the parties may fitly be called pseudo-guarantee treaties, and although their political value is very great, they have scarcely any legal importance. For the parties do not bind themselves to pursue a policy for maintaining the *status quo*; they only declare their firm resolution to that end. Further, the parties do not engage themselves to uphold the *status quo*, but only to communicate with one another, in case the *status quo* is threatened, with a view to agreeing upon such measures as they may consider advisable for the maintenance of the *status quo*. To this class of pseudo-guarantee treaties belonged two sets of declarations which were of considerable diplomatic importance before the World War :—

(1) The declarations¹ exchanged on May 16, 1907, between France and Spain on the one hand, and, on the other hand, between Great Britain and Spain, concerning the territorial *status quo* in the Mediterranean. Each party declared that its general policy with regard to the Mediterranean was directed to the maintenance of the territorial *status quo*, and that it was therefore resolved to preserve intact its rights over its insular and maritime possessions within the Mediterranean. Each party declared, further, that, should circumstances arise which would tend to alter the existing territorial *status quo*, it would communicate with the other party in order to afford it the opportunity to concert, if desired, by mutual agreement the course of action which the two parties should adopt in common.

¹ See Martens, *N.R.G.*, 2nd Ser. xxxv. p. 692, and 3rd Ser. i. p. 3.

(2) The declarations¹ concerning the maintenance of the territorial *status quo* in the North Sea, signed at Berlin on April 23, 1908, by Great Britain, Germany, Denmark, France, Holland, and Sweden, and concerning the maintenance of the territorial *status quo* in the Baltic, signed at St. Petersburg, on the same date, by Germany, Denmark, Russia, and Sweden. The parties declared their firm resolution to preserve intact the rights of all the parties over their continental and insular possessions within the region of the North Sea and of the Baltic respectively. And the parties concerned further declared that, should the existing territorial *status quo* be threatened by any events whatever, they would enter into communication with one another, with a view to agreeing upon such measures as they might consider advisable in the interest of the maintenance of the *status quo*.

There is no doubt that the texts of the declarations concerning the *status quo* in the North Sea and the Baltic stipulated a stricter engagement of the respective parties than the texts of the declarations concerning the *status quo* in the Mediterranean, but neither² of them comprised a real legal guarantee.

§ 577. Different from guarantee treaties are treaties of protection. Whereas the former constitute the guarantee of a certain object to the guaranteed State, treaties of protection are treaties by which strong States simply engage to protect weaker States without any guarantee whatever. A treaty of protection must, however, not be confounded with a treaty of protectorate.³

¹ See Martens, *N.R.G.*, 3rd Ser. i. pp. 17 and 18.

² Whereas Quabbe (p. 97, n. 1) correctly denies the character of a real guarantee to the declarations concerning the Mediterranean, he

(p. 105) considers the declarations concerning the North Sea and the Baltic to have been real guarantee treaties.

³ See above, § 92.

V

COMMERCIAL TREATIES

Taylor, § 354—Moore, v. §§ 765-769—Melle in *Holtzendorff*, iii. pp. 143-256—Liszt, § 28—Ullmann, § 145—Bonfils, No. 918—Despagnet, No. 462—Pradier-Fodéré, iv. Nos. 2005-2033—Mérignhac, ii. pp. 688-693—Rivier, i. pp. 370-374—Fiore, ii. Nos. 1065-1077, and *Code*, Nos. 853-864—Martens, ii. §§ 51-55—Steck, *Versuch über Handels- und Schiffsverträge* (1782)—Schraut, *System der Handelsverträge und der Meistbegünstigung* (1884)—Veillevitch, *Les Traités de Commerce* (1892)—Nys, *Les Origines du Droit international* (1894), pp. 278-294—Herod, *Favoured Nation Treatment* (1901)—Calwer, *Die Meistbegünstigung in den Vereinigten Staaten von Nord-America* (1902)—Glier, *Die Meistbegünstigungs-Klausel* (1906)—Cavaretta, *La Clausola della Nazione più favorita* (1906)—Barclay, *Problems of International Practice and Diplomacy* (1907), pp. 137-142—Hornbeck, *The Most-Favoured-Nation Clause* (1910), and in *A.J.*, iii. (1909), pp. 394-422, 619-647, and 798-827—Weber, *System des deutschen Handelsverträge* (1912)—Teubern, *Die Meistbegünstigungs-Klausel* (1913)—Hepp, *Théorie générale de la Clause de la Nation la plus favorisée* (1914)—Crandall, *op. cit.*, §§ 172-177—Lehr in *R.I.*, xxv. (1893), pp. 313-316—Visser in *R.I.*, 2nd Ser. iv. (1902), pp. 66-87, 159-177, and 270-280—Lehr in *R.I.*, 2nd Ser. xii. (1910), pp. 657-668—Shepherd in the *Journal of the Society of Comparative Legislation*, New Ser. iii. (1901), pp. 231-237, and v. (1903), pp. 132-136—Oppenheim in the *Law Quarterly Review*, xxiv. (1908), pp. 328-334—Lederle and Springer in *Z.I.*, xxvii. (1918), pp. 154-176 and 314-322.

Com-
mercial
Treaties
in
general.

§ 578. Commercial treaties are treaties concerning the commerce and navigation of the contracting States, and concerning the subjects of these States who are engaged in commerce and navigation. Incidentally, however, they also contain clauses concerning consuls and various other matters. They are concluded, either for a limited or an unlimited number of years, and either for the whole territory of one or either party, or only for a part of such territory. All full sovereign States are competent to enter into commercial treaties, but it depends upon the special case whether half and part sovereign States are likewise competent. Although competent to enter upon commercial treaties, a State may, by an international compact, be restricted in its freedom with regard to its commercial policy. Thus,

according to the Convention of September 10, 1919, revising the General Act of the Berlin Congo Conference of February 26, 1885, all the Powers which have possessions in the Congo district must grant complete freedom of commerce to all the parties to the convention. Again, to give another example, Austria, Germany, and Bulgaria are bound, while certain clauses of the Treaties of Peace are in force, to extend to all the Allied and Associated States every privilege in regard to the importation, exportation, or transit of goods granted by them to any foreign country whatever.¹ And doubtless a similar obligation will be imposed on Hungary and Turkey.

The details of commercial treaties are, for the most part, purely technical, and are, therefore, outside the scope of a general treatise on International Law. There are, however, two points of great importance which require discussion—namely, the meaning of coasting-trade, and of the most-favoured-nation clause.

§ 579. The meaning of the term coasting-trade² in commercial treaties must not be confounded with its meaning in International Law generally. The meaning of the term in International Law becomes apparent through its synonym *cabotage*—that is, navigation from cape to cape along the coast, combined with trading between the ports of the coast concerned, without going out into the open sea. Therefore, trade between Marseilles and Nice, between Calais and Havre, between London and Liverpool, and between Dublin and Belfast is coasting-trade, but trade between Marseilles and Havre, and between London and Dublin is not. It is a universally recognised rule³ of International Law that every littoral State can exclude foreign merchantmen

Meaning
of Coast-
ing-trade
in Com-
mercial
Treaties.

¹ See Treaty of Peace with Germany, Article 267; with Austria, Article 220; with Bulgaria, Article 150.

² See Oppenheim in the *Law Quarterly Review*, xxiv. (1908), pp. 328-334.

³ See above, § 187.

from the *cabotage* within its maritime belt. Cabotage is the contrast to the oversea¹ carrying-trade, and has nothing to do with the question of free trade from or to a port on the coast to or from a port abroad. This question is one of commercial policy, and International Law does not prevent a State from restricting to vessels of its subjects the export or the import to its ports, or from allowing such export or import under certain conditions only.

There is no doubt that originally the meaning of coasting-trade in commercial treaties was identical with its meaning in International Law generally, but there is likewise no doubt that the practice of the States gives now a much more extended meaning to the term coasting-trade, as used in commercial treaties. Thus France distinguishes between cabotage *petit* and *grand*; whereas *petit* cabotage is coasting-trade between ports in the same sea, *grand* cabotage is coasting-trade between a French port situated in the Atlantic Ocean and a French port situated in the Mediterranean, and—according to a statute of September 21, 1793—both *grand* and *petit* cabotage are exclusively reserved for French vessels. Thus, further, the United States of America has always considered trade between one of her ports in the Atlantic Ocean and one in the Pacific to be coasting-trade, and has exclusively reserved it for vessels of her own subjects; she considered such trade to be coasting-trade even when, before the Panama Canal was built, the carriage took place, not exclusively by sea around Cape Horn, but partly by sea and partly by land across the Isthmus of Panama. Great Britain has taken up a similar attitude. Section 2

¹ It must be emphasised that navigation and trade from abroad to several ports of the same coast successively—for instance, from Dover to Calais and then to Havre

—is not coasting-trade but oversea trade, provided that all the passengers and cargo are shipped from abroad.

of the Navigation Act of 1849 (12 & 13 Vict. c. 29) enacted that 'no goods or passengers shall be carried *coastwise* from one part of the United Kingdom to another, or from the Isle of Man to the United Kingdom, except in British ships,' and thereby declared trade between a port of England or Scotland to a port of Ireland or the Isle of Man to be coasting-trade exclusively reserved for British ships, in spite of the fact that the open sea flows between these ports. And although the Navigation Act of 1849 is no longer in force, and this country now does admit foreign ships to its coasting-trade, it nevertheless still considers all trade between one port of the United Kingdom and another to be coasting-trade, as becomes apparent from § 140 of the Customs Consolidation Act of July 24, 1876 (39 & 40 Vict. c. 36). Again, Germany declared by a statute of May 22, 1881, coasting-trade to be trade between any two German ports, and reserved it for German vessels, although vessels of such States could be admitted as on their part admitted German vessels to their own coasting-trade. Thus trade between Koenigsberg in the Baltic and Hamburg in the North Sea is coasting-trade.

These instances are sufficient to demonstrate that an extension of the original meaning of coasting-trade has really taken place, and has found general recognition. A great many commercial treaties have been concluded between such countries as established that extension of meaning and others, and these commercial treaties no doubt make use of the term coasting-trade in this its extended meaning. It must, therefore, be maintained that the term coasting-trade or cabotage as used in commercial treaties has acquired the following meaning: *Sea-trade between any two ports of the same country whether on the same coast or different coasts, provided always that the different coasts are all of them*

the coasts of one and the same country as a political and geographical unit, in contradistinction to the coasts of colonies or dominions of such country.

In spite of this established extension of the term coasting-trade, it did not include colonial trade until nearly the end of the nineteenth century.¹ Indeed, when Russia, by *ukase* of 1897, enacted that trade between any of her ports should be considered coasting-trade, and be reserved for Russian vessels, this did not comprise a further extension of the conception of coasting-trade. The reason was that Russia, although her territory extended over different parts of the globe, was a political and geographical unit, and there was one stretch of territory only between St. Petersburg and Vladivostock. But when, in 1898 and 1899, the United States of America declared trade between any of her ports and those of Porto Rico, the Philippines, and the Hawaiian Islands to be coasting-trade, and consequently reserved it exclusively for American vessels, the distinction between coasting-trade and oversea or colonial trade fell to the ground. It is submitted that this American extension of the conception of coasting-trade, as used in her commercial treaties before 1898, is inadmissible,² and contains a violation of the treaty

¹ See details in Oppenheim, *loc cit.*, pp. 331-332, but it is of value to draw attention here to a French statute of April 2, 1889. Whereas a statute of April 9, 1866, had thrown open the trade between France and Algeria to vessels of all nations, Article 1 of the statute of April 2, 1889, enacts: 'La navigation entre la France et l'Algérie ne pourra s'effectuer que sous pavillon français.' This French statute does not, as is frequently maintained, declare the trade between France and Algeria to be coasting-trade, but it nevertheless reserves such trade exclusively for French vessels. The French Government, in bringing the bill before the French Parliament, explained that

the statute could not come into force before February 1, 1892, because Article 2 of the treaty with Belgium of October 31, 1881, and Article 21 of the treaty with Spain of February 6, 1882—both treaties to expire on February 1, 1892—stipulated the same treatment for Belgian and Spanish as for French vessels, *cabotage excepted*. It is quite apparent that, if France had declared trade between French and Algerian ports to be coasting-trade in the meaning of her commercial treaties, the expiration of the treaties with Belgium and Spain need not have been awaited for putting the law of April 2, 1889, into force.

² In the case of *Huus v. New York*

rights of the other contracting parties. Should these parties consent to the American extension of the meaning of coasting-trade, and should other countries follow the American lead, and apply the term coasting-trade indiscriminately to trade along their coasts *and* to their colonial trade, the meaning of the term would then become *trade between any two ports which are under the sovereignty of the same State*. The distinction between coasting-trade and colonial trade would then become void, and the last trace of the synonymity between coasting-trade and cabotage would have disappeared.

§ 580. Most of the commercial treaties of the nineteenth century contain a stipulation which is characterised as the most-favoured-nation clause. The wording of this clause is by no means the same in all treaties, and its general form has therefore to be distinguished from several others which are more specialised in their wording. According to the most-favoured-nation clause in its general form, all favours which either contracting party has granted in the past, or will grant in the future, to any third State must be granted to the other party. But the real meaning of this clause in its general form has been controverted ever since the United States of America entered into the Family of Nations, and began to conclude commercial treaties embodying it. Whereas, in former times, the clause was considered obviously to have the effect of causing all favours granted to any one State *at once and unconditionally* to accrue to all other States having most-favoured-nation treaties with the grantor, the United States contended that these favours could accrue to such of the other States only as

Meaning
of Most-
favoured-
nation
Clause.

and Porto Rico Steamship Co., (1901) 182 U.S. 392, the court was compelled to confirm the extension of the term coasting-trade to trade between any American port and Porto Rico, because this extension was recognised by Section 9 of the

Porto Rican Act, and because, according to the practice of the American courts, statutory law overrules previous International Law — see above, § 21a (2), and Oppenheim, *The Panama Canal Conflict* (1913), pp. 40-42.

fulfilled the same conditions under which these favours had been allowed to the grantee. The majority of the commercial treaties of the United States, therefore, do not contain the most-favoured-nation clause in its general form, but in what is called its conditional, qualified, or reciprocal form. In this form it stipulates that all favours granted to third States shall accrue to the other party unconditionally, in case the favours have been allowed unconditionally to the grantee, but only under the same compensation, in case they have been granted conditionally. The United States, however, has always upheld the opinion that, even if a commercial treaty contains the clause in its general, and not in its qualified, form, it must always be interpreted as though it were worded in its qualified form, and the Supreme Court of the United States has confirmed ¹ this interpretation.

Now nobody doubts that, according to the qualified form of the clause, a favour granted to any State can only accrue to other States having most-favoured-nation treaties with the grantor, provided they fulfil the same conditions, and offer the same compensations as the grantee. Again, nobody doubts that, if the clause is worded in its so-called unconditional form, stipulating that a favour should accrue to other States whether it was allowed to the grantee gratuitously or conditionally against compensation, all favours granted to any State accrue immediately and without condition to all the other States. However, as regards the clause in its general form, what might, broadly speaking, be called the European interpretation is confronted by the American interpretation. This American interpretation is, I believe, unjustifiable, although it is of importance to mention that two European writers of

¹ See *Bartram v. Robertson*, 122 U.S. 116, and *Whitney v. Robertson*, 124 U.S. 190.

such authority as Martens (ii. p. 225) and Westlake (i. p. 294) approve of it.

It has been suggested ¹ that the controversy should be brought before the Hague Court of Arbitration; yet the United States will never consent to this. Those States which complain of the American interpretation had therefore better notify their commercial treaties with the United States, and insert in new treaties the most-favoured-nation clause in such a form as puts matters beyond all doubt. So much is certain, a State that at present enters into a commercial treaty with the United States comprising the clause in its general form cannot complain ² of the American interpretation, which, whatever may be its merits, is now a matter of common knowledge.³

VI

UNIONS CONCERNING COMMON NON-POLITICAL INTERESTS

Nys, ii. pp. 311-318—Mérignhac, ii. pp. 694-732—Descamps, *Les Offices internationaux et leur Avenir* (1894)—Moynier, *Les Bureaux internationaux des Unions universelles* (1892)—Poinsard, *Les Unions et Ententes internationales* (2nd ed. 1901)—Reinsch, *Public International Unions* (1911), and in *A.J.*, i. (1907), pp. 579-623, and iii. (1909), pp. 1-45—Sayre, *Experiments in International Administration* (1919)—Renault in *R.G.*, iii. (1896), pp. 14-26—Guillois in *R.G.*, xxii. (1915), pp. 5-127.

§ 581. The development of international intercourse has called into existence innumerable treaties for the purpose of satisfying economic, and other non-political, interests of the several States. Each nation concludes

Object of
the
Unions.

¹ See Barclay, *op. cit.*, pp. 142 and 159.

² See above, § 554 (10).

³ It is not possible in a general treatise on International Law to enter into the details of the history, the different forms, the application, and the interpretation of the most-

favoured-nation clause. Readers must be referred for further information to the works and articles of Calwer, Herod, Glier, Cavaretta, Visser, Melle, and others quoted above before § 578. See also Moore, v. §§ 765-769, and Crandall in *A.J.*, vii. (1913), pp. 708-723.

treaties of commerce, of navigation, of extradition, and of many other kinds with most of the other nations, and tries in this way, more or less successfully, to foster its own interests. Many of these interests are of such a particular character, and depend upon such individual circumstances and conditions, that they can only be satisfied and fostered by special treaties, from time to time concluded by each State with other States. Yet experience has shown that the several States have also many non-political interests in common, which can better be satisfied and fostered by a general treaty between a great number of States than by special treaties separately concluded between the several parties. Therefore, since the second half of the nineteenth century such general treaties more and more came into being, and it is certain that their number will in time increase. Each of these treaties created what is called a Union among the contracting parties, since these parties united for the purpose of settling certain subjects in common. The number of States which are members of these Unions varies, of course; and whereas some of them will certainly become in time universal in the same way as the Universal Postal Union, others will never reach that stage. But all the treaties which have created these Unions are general treaties, because a lesser or greater number of States are parties, and these treaties have created so-called Unions, although the term 'Union' is not always made use of.¹

581b. At the Peace Conference at Paris in 1919, the Allied and Associated Powers availed themselves of the opportunity to review the existing general treaties of

¹ A general treatise on Public International Law cannot attempt to go into the details of these Unions; it is really a matter for monographs or for a treatise on International Administrative Law, such as Neumeyer's *Internationales Verwaltungs-*

recht, which is to comprise three volumes, and of which the first volume appeared in 1910. See also Reinsch, *Public International Unions* (1911), and Niemeyer in *R.G.*, xviii. (1911), pp. 492-499.

‘an economic or technical character.’ Treaties of this class would seem to correspond generally with what are in this book called Unions concerning non-political interests. With regard to such treaties, it is expressly provided by each of the Treaties of Peace that only those which are there mentioned are to be applied for the future between the Central Power concerned and the Allied and Associated Powers party thereto. Of the treaties so mentioned, some are to be applied, as from the coming into force of the Treaty of Peace, without modification; others are to be subject to special stipulations contained in the Treaty of Peace; to others the Central Power concerned undertakes to accede, or to accord ratification.¹ Moreover, the treaties between the Principal Allied and Associated Powers and certain minor Allied Powers contain provisions under which the latter undertake to accede to specified general treaties.² The arrangements made at the Peace Conference cannot legally modify the rights of States which were parties to any particular general treaty, but were not parties to the Treaties of Peace;³ but it may be assumed⁴ that any objection raised by any such State would be adjusted by negotiation, and the number and political importance of the Powers which were represented at Paris warrants the expectation that, in practice, of those general treaties of an economic or technical character to which one of the Central Powers is a party, only those will be regarded as being in force which are enumerated in the Treaties of Peace. In point of fact, as will appear in the remaining paragraphs of this volume, almost all general treaties of importance are so enumerated. It is important to emphasise that the observations made

Position
of Unions
after the
World
War.

¹ See Section II of the ‘Economic Clauses’ in the various Treaties of Peace.

³ See above, § 522.

² As to these treaties, see above, § 568h.

⁴ The editor is responsible for this section, and for the opinions expressed in it.

in this section are only applicable to *general* treaties of an *economic or technical character*. Moreover, nothing here said is to be taken to imply that these treaties were in any way *abrogated* by the World War, though they were *suspended* as between belligerents. (See below, vol. ii. § 99.)

Post and
Tele-
graphs.

§ 582. Whereas previously the States severally concluded treaties concerning postal and telegraphic arrangements, they entered into Unions for this purpose during the second part of the nineteenth century :—

(1) Twenty-one States entered on October 9, 1874, at Berne, into a general postal convention¹ for the purpose of creating a General Postal Union. This General Union turned into the Universal Postal Union through the Convention of Paris² of June 1, 1878, to which thirty States were parties. This convention has several times been revised by the congresses of the Union, which have to meet every five years. The last three revisions took place at Vienna, Washington, and Rome respectively, in 1891, 1897, and 1906. At Rome on May 26, 1906, a new Universal Postal Convention³ was signed by all the members of the Family of Nations for themselves and their colonies and dependencies. This Union possesses an international office seated at Berne.

By the Treaties of Peace,⁴ the Central Powers undertake not to refuse their assent to the conclusion by the new States (Poland, Czecho-Slovakia, etc.) which accede to the Conventions of 1891, 1897, and 1906, relating to the Universal Postal Union, of the special arrangements referred to in these conventions.⁵

(2) A general telegraphic convention was concluded

¹ See Martens, *N.R.G.*, 2nd Ser. i. p. 651.

² See Martens, *N.R.G.*, 2nd Ser. iii. p. 699.

³ See Martens, *N.R.G.*, 3rd Ser. i. p. 355.

⁴ See Treaty of Peace with Ger-

many, Article 283; with Austria, Article 235; with Bulgaria, Article 163. The other Treaties of Peace may be expected to contain similar provisions.

⁵ See Fischer, *Post und Telegraphie im Weltverkehr* (1879); Schröter, *Der*

at Paris as early as May 17, 1865, and in 1868 an International Telegraph Office¹ was instituted at Berne. In time more and more States joined, and the basis of the Union is now the Convention of St. Petersburg² of July 22, 1875, which has been amended several times, the last time at Lisbon³ on June 11, 1908.

By the Treaties of Peace, the Central Powers undertake not to refuse their consent to the conclusion by the new States which accede to the Conventions of 1875 and 1908, relating to the International Telegraphic Union, of the special arrangements referred to in these conventions.⁴

(3) On the general treaty of March 14, 1884, for the protection of submarine telegraph cables,⁵ see above, § 287.

(4) A general radiotelegraphic convention and an additional convention were signed on November 3, 1906, at Berlin. They were replaced by a convention signed by thirty Powers on July 5, 1912, at London. The International Telegraph Office at Berne serves also as the office for the International Union for Radiotelegraphy. The Radiotelegraphic Convention, and the stipulations with regard to it in the Treaties of Peace, have been discussed above.⁶

§ 583. General conventions are in existence in the interest of transport and communication: ⁷—

(1) On May 15, 1886, two conventions were signed

Weltpostverein (1900); Rolland, *De la Correspondance postale et télégraphique dans les Relations internationales* (1901); Beelenkamp, *Les Lois postales universelles* (1910).

¹ See above, § 464, and Fischer, *Die Telegraphie und das Völkerrecht* (1876).

² See Martens, *N.R.G.*, 2nd Ser. iii. p. 614.

³ See Martens, *N.R.G.*, 3rd Ser. v. p. 208.

⁴ See Treaty of Peace with Germany, Article 283; with Austria, Article 235; with Bulgaria, Article 163. The other Treaties of Peace may be expected to contain similar

provisions.

⁵ See Martens, *N.R.G.*, 2nd Ser. xi. p. 281. According to the Treaties of Peace (with Germany, Article 282, with Austria, Article 234, with Bulgaria, Article 167), this treaty is to be again applied between the parties thereto without modification, and Bulgaria is to accede.

⁶ See Martens, *N.R.G.*, 3rd Ser. iii. p. 147, and Treaty Ser. (1913), No. 10. See above, § 174 (2), and §§ 287*a* and 287*b*, where the literature concerned is also to be found.

⁷ See also the provisions regarding transport and communication in the

Transport
and Com-
munica-
tion.

at Berne, one relating to the technical standardisation of railways, and the other relating to the sealing of railway trucks subject to customs inspection.¹ These two conventions were revised by two protocols, signed at Berne on May 18, 1907.² According to the Treaties of Peace, both the conventions of 1886, and the protocol of 1907 regarding the sealing of railway trucks, are to be again applied between the parties thereto.³

(2) A general convention⁴ was concluded on October 14, 1890, at Berne, concerning railway transports and freights. The parties—namely, Austria-Hungary, Belgium, France, Germany, Holland, Italy, Luxemburg, Russia, and Switzerland—form a Union for this purpose, although the term ‘Union’ is not made use of. The Union possesses an international office⁵ at Berne, which issues the *Zeitschrift für den internationalen Eisenbahn Transport* and the *Bulletin des Transports internationaux par chemins de fer*. Denmark, Roumania, and Sweden acceded to this Union some time after its conclusion. Additional conventions were made on September 20, 1893, July 16, 1895, June 16, 1898, and September 19, 1906. By the Treaties of Peace with Germany⁶ and Austria,⁷ the High Contracting Parties renew, in so far as concerns them, these conventions regarding transport of goods by rail; but if a new con-

Treaties of Peace. See also the convention signed at Brussels on February 4, 1898, by Germany, Belgium, France, and Holland, relating to the tonnage measurement of vessels for inland navigation (Martens, *N.R.G.*, 2nd Ser. xxviii. p. 733). This convention is, under the Treaty of Peace with Germany, to be again applied without modification between the parties thereto (see Article 282).

¹ Martens, *N.R.G.*, 2nd Ser. xxii. p. 42.

² Martens, *N.R.G.*, 3rd Ser. ii. p. 878.

³ See Treaty of Peace with Ger-

many, Article 282; with Austria, Article 234; with Bulgaria, Article 162.

⁴ See Martens, *N.R.G.*, 2nd Ser. xix. p. 289.

⁵ See above, § 470, and Kaufmann, *Die mitteleuropäischen Eisenbahnen und das internationale öffentliche Recht* (1893); Rosenthal, *Internationales Eisenbahnfrachtrecht* (1894); Magne, *Des Raccordements internationaux des Chemins de Fer*, etc. (1901); Eger, *Das internationale Uebereinkommen über den Eisenbahnfrachtverkehr* (2nd ed. 1903).

⁶ Article 366.

⁷ Article 313.

vention is concluded within five years to replace them, Germany and Austria are to be bound by it.

(3) A general convention concerning the International Circulation of Motor Vehicles¹ was concluded on October 11, 1909, at Paris. The original signatory Powers were : Great Britain, Germany, Austria-Hungary, Belgium, Bulgaria, Spain, France, Greece, Italy, Monaco, Montenegro, Holland, Portugal, Roumania, Russia, Serbia. To give effect to this convention in Great Britain, Parliament passed in 1909 the Motor Car (International Circulation) Act,² 9 Edw. VII. c. 37. Under the Treaties of Peace this convention is to be again applied as between the parties thereto without modification.

(4) As to the two Brussels Conventions of September 23, 1910, one for the unification of certain rules of law with respect to collisions, and the other for the unification of certain rules of law with respect to assistance and salvage at sea, see above, §§ 265, 271.

(5) As to the unratified Convention of January 20, 1914, for the safety of life at sea, see above, § 265.

§ 584. On September 9, 1886, the Convention of Berne was signed for the purpose of creating an International Union for the Protection of Works of Art and Literature. The Union has an international office³ at Berne. An additional Act to the convention was signed at Paris on May 4, 1896. Since, however, the stipulations of these conventions did not prove quite adequate, the 'Revised⁴ Berne Convention' was signed

¹ See Martens, *N.R.G.*, 3rd Ser. iii. p. 834, and Treaty Ser. (1910), No. 18.

² See also the Motor Car (International Circulation) Order in Council, 1910, and Amending Order of 1912.

³ See above, § 467, and Orelli, *Der internationale Schutz des Urheberrechts* (1887); Thomas, *La Convention littéraire et artistique internationale*, etc. (1894); Briggs, *The Law of*

International Copyright, (1906); Röthlisberger, *Die Berner Übereinkunft zum Schutze von Werken der Literatur und Kunst* (1906), and in *La Vie internationale*, ii. (1912), pp. 201-247.

⁴ See Martens, *N.R.G.*, 3rd Ser. iv. p. 590, and Treaty Ser. (1912), No. 19; Wauwermans, *La Convention de Berne (révisée à Berlin) pour la Protection des Œuvres Littéraires et Artistiques* (1910).

at Berlin on November 13, 1908, and completed by an additional protocol signed at Berne on March 20, 1914. The original signatory Powers of this convention were Great Britain, Germany, Belgium, Denmark, Spain, France, Haiti, Italy, Japan, Liberia, Luxemburg, Monaco, Norway, Sweden, Switzerland, Tunis; other States acceded later.¹ To give effect to the Convention of Berne of 1886, Parliament passed in 1886 the 'Act to amend the Law respecting International and Colonial Copyright' (49 & 50 Vict. c. 33). This Act, however, was, in consequence of the 'Revised Berne Convention' of Berlin of 1908, repealed by § 37 of the Copyright Act, 1911 (1 & 2 Geo. v. c. 46), and §§ 29 and 31 of the latter Act now deal with International Copyright.

Commerce
and
Industry.

§ 585. In the interests of commerce and industry the following Unions are in existence :—

(1) On July 5, 1890, the Convention of Brussels was signed for the purpose of creating an International Union for the Publication of Customs Tariffs.² The Union has an international office³ at Brussels, which publishes the customs tariffs of the various States of the globe. Forty-five States were members of the Union before the World War. By the Treaties of Peace this convention is to be again applied between the parties thereto without modification.⁴

(2) On March 20, 1883, the Convention of Paris⁵ was signed for the purpose of creating an International Union for the Protection of Industrial Property. The original members were : Belgium, Brazil, San Domingo, France,

¹ By Article 286 of the Treaty of Peace with Germany, these conventions are again to be applied between the parties thereto, except in so far as they are modified by the Treaty of Peace. Austria (Treaty of Peace with Austria, Article 239) and Bulgaria (Treaty of Peace with Bulgaria, Article 166) are to accede

to them.

² See Martens, *N.R.G.*, 2nd Ser. xviii. p. 558.

³ See above, § 469.

⁴ Treaty of Peace with Germany, Article 282; with Austria, Article 234; with Bulgaria, Article 162.

⁵ See Martens, *N.R.G.*, 2nd Ser. x. p. 133.

Holland, Guatemala, Italy, Portugal, Salvador, Serbia, Spain, and Switzerland. Great Britain, Japan, Denmark, Mexico, the United States of America, Sweden-Norway, Germany, Cuba, and Austria-Hungary acceded later. This union established an international office¹ at Berne; its object is the protection of patents, trade-marks, and the like. On April 14, 1891, at Madrid, it agreed to arrangements concerning false indications of origin and the registration of trade-marks;² and an additional Act³ was signed at Brussels on December 14, 1900. But in 1911 a conference met at Washington in order to revise the previous conventions, and on June 2, 1911, was signed the International Convention for the Protection of Industrial Property, which is now the basis of the Union.⁴ The signatory Powers were Great Britain, Germany, Austria-Hungary, Belgium, Brazil, Cuba, Denmark, San Domingo, Spain, the United States of America, France, Italy, Japan, Mexico, Norway, Holland, Portugal, Sweden, Switzerland, and Tunis. Most of these States have ratified the convention. By the Treaties of Peace with Germany⁵ and Austria,⁶ these conventions are to be again applied between the parties except in so far as they are affected by the provisions of the Treaties of Peace. Bulgaria⁷ is to accede to them.

(3) On March 5, 1902, the Convention of Brussels⁸ was signed, concerning the abolition of bounties on the production and exportation of sugar. An addi-

¹ See above, § 467.

² See Martens, *N.R.G.*, 2nd Ser. xxii. p. 208; Pelletier et Vidal-Noguét, *La Convention d'Union pour la Protection de la Propriété industrielle du 20 mars 1883 et les Conférences de Revision postérieures* (1902); Pillet, *Le Régime international de la Propriété industrielle* (1911).

³ See Martens, *N.R.G.*, 2nd Ser. xxx. p. 475.

⁴ See Treaty Ser. (1913), No. 7 and No. 8, and Martens, *N.R.G.*, 3rd Ser. viii. p. 760.

⁵ Article 286.

⁶ Article 237.

⁷ Article 166.

⁸ See Martens, *N.R.G.*, 2nd Ser. xxxi. p. 272; Kaufmann, *Welt-Zucker Industrie und internationale und coloniales Recht* (1904); Borel in *R.I.*, 2nd Ser. xiv. (1912), pp. 150-158; André in *R.G.*, xix. (1912), pp. 665-689.

tional Act¹ was signed at Brussels on August 28, 1907. A Permanent Commission was established at Brussels for the purpose of supervising the execution of the convention.² But Great Britain and Italy withdrew in 1912, and the convention is not mentioned in the Treaties of Peace; it seems therefore, for practical purposes, to be no longer in force.

Agriculture.

§ 586. Three general conventions are in existence in the interest of agriculture :—

(1) On June 7, 1905, the Convention for the Creation of an International Agricultural Institute³ was signed at Rome by forty States. The Institute has its seat at Rome. By the Treaties of Peace this convention is to be again applied between the parties to it without modification.⁴

(2) Owing to the great damage done to grapes through phylloxera epidemics a general convention⁵ for the prevention of the extension of such epidemics was concluded on September 17, 1878, at Berne. Its place was afterwards taken by the convention⁶ signed at Berne on November 3, 1881. The original members were: Austria-Hungary, France, Germany, Portugal, and Switzerland. Belgium, Italy, Spain, Holland, Luxemburg, Roumania, and Serbia acceded later. A further convention was signed on April 15, 1889. By the Treaties of Peace these conventions are to be again applied without modification between the parties to them, and Bulgaria is to accede to them.⁷

(3) On March 19, 1902, a general convention⁸ was

¹ See Martens, *N.R.G.*, 3rd Ser. i. p. 374.

² See above, §§ 462 and 471.

³ See above, § 471a; Martens, *N.R.G.*, 3rd Ser. ii. p. 238, and Treaty Ser. (1910), No. 17; Louis-Dop in *La Vie internationale*, i. (1912), pp. 428-454.

⁴ See Treaty of Peace with Germany, Article 282; with Austria, Article 234; with Bulgaria, Article

162.

⁵ See Martens, *N.R.G.*, 2nd Ser. vi. p. 261.

⁶ See Martens, *N.R.G.*, 2nd Ser. viii. p. 435.

⁷ See Treaty of Peace with Germany, Article 282; with Austria, Article 234; with Bulgaria, Article 167.

⁸ See Martens, *N.R.G.*, 2nd Ser. xxx. p. 686.

signed at Paris, concerning the preservation of birds useful to agriculture, by Germany, Austria-Hungary, Belgium, Spain, France, Greece, Luxemburg, Monaco, Norway, Portugal, Sweden, Switzerland. By the Treaties of Peace this convention is to be again applied between the parties thereto without modification. Bulgaria is to accede to it.¹

§ 587. Apart from the Labour Convention (see above, § 568i), general treaties are in existence with regard to the welfare of the working classes : ^{Welfare of Working Classes.} 2—

(1) On September 26, 1906, was signed at Berne a convention ³ concerning the prohibition of the use of white phosphorus in the manufacture of matches. The original parties were : Germany, Denmark, France, Holland, Luxemburg, Switzerland. Great Britain and some other States acceded later. To give effect to this convention in Great Britain, Parliament passed, in 1908, the White Phosphorus Matches Prohibition Act (8 Edw. VII. c. 42). By the Treaties of Peace this convention is to be again applied between the parties to it without modification. Austria and Bulgaria are to accede.⁴

(2) Likewise at Berne on September 26, 1906, was signed the convention ⁵ for the prohibition of night-work for women in industrial employment. The original parties were : Great Britain, Germany, Austria-

¹ See Treaty of Peace with Germany, Article 282; with Austria, Article 234; with Bulgaria, Article 167.

² See Gemma, *Il Diritto internazionale del Lavoro* (1912); Sinzot, *Traité internationaux pour la Protection des Travailleurs* (1911); Mahaim, *Le Droit international ouvrier* (1913), and in *R.I.*, 2nd Ser. xiv. (1912), pp. 113-128, 388-410; Keichersberg, *Internationaler Arbeiterschutz* (1913); Lammasch, *Das Völkerrecht nach dem Kriege* (1917), pp. 48-54; Bauer, *Arbeiterschutz und Völgemeinschaft* (1918);

Pic in *R.G.*, xi. (1904), p. 515, xii. (1905), p. 565, xiv. (1907), p. 495, xx. (1913), p. 752. See also Reports of the International Association for Labour Legislation.

³ See Martens, *N.R.G.*, 3rd Ser. ii. p. 872, and Treaty Ser. (1909), No. 4.

⁴ See Treaty of Peace with Germany, Article 282; with Austria, Article 240; with Bulgaria, Article 167.

⁵ See Martens, *N.R.G.*, 3rd Ser. ii. p. 861, and Treaty Ser. (1910), No. 21.

Hungary, Belgium, Spain, France, Luxemburg, Holland, Portugal, and Switzerland. Italy and Sweden, which had signed the convention, but had not ratified in time, acceded in 1910. By the Treaties of Peace this convention is to be again applied without modification between the parties thereto. Bulgaria is to accede to it.¹

Weights,
Measures,
Coinage.

§ 588. One Union concerning weights and measures and two monetary Unions are in existence :—

(1) In the interest of the unification and improvement of the metric system, a general convention² was signed at Paris on May 20, 1875, for the purpose of instituting at Paris an International Office³ of Weights and Measures. The original parties were : Argentina, Austria-Hungary, Belgium, Brazil, Denmark, France, Germany, Italy, Peru, Portugal, Russia, Spain, Sweden-Norway, Switzerland, Turkey, the United States of America, and Venezuela ; but Brazil has never ratified, and Venezuela withdrew in 1912. Other States acceded later. By the Treaties of Peace this convention is to be again applied without modification by the parties thereto.⁴

(2) On December 23, 1865, Belgium, France, Italy, and Switzerland signed the Convention of Paris which created the so-called ' Latin Monetary Union ' between the parties ; Greece acceded in 1868.⁵ This convention has been four times renewed and amended—namely, in 1878, 1885, 1893,⁶ and 1920.

Another Monetary Union is that entered into by Denmark, Sweden, and Norway, by the Convention of Copenhagen⁷ of May 27, 1873.

¹ See Treaty of Peace with Germany, Article 282 ; with Austria, Article 234 ; with Bulgaria, Article 167.

² See Martens, *N.R.G.*, 2nd Ser. i. p. 663, and Guillaume in *La Vie internationale*, iii. (1913), pp. 5-44.

³ See above, § 466.

⁴ See Treaty of Peace with Ger-

many, Article 282 ; with Austria, Article 234 ; with Bulgaria, Article 162.

⁵ See Martens, *N.R.G.*, xx. pp. 688 and 694.

⁶ See Martens, *N.R.G.*, 2nd Ser. iv. p. 725, xi. p. 65, xxi. p. 285.

⁷ See Martens, *N.R.G.*, 2nd Ser. i. p. 290.

These two Unions are, of course, not mentioned in the Treaties of Peace, because no Central Power was a party to them, and their applicability is wholly unaffected by the proceedings at the Peace Conference at Paris in 1919.

On November 22, 1892, the International Monetary Conference¹ met at Brussels, where the following States were represented: Great Britain, Austria-Hungary, Belgium, Denmark, France, Germany, Greece, Holland, Italy, Mexico, Portugal, Roumania, Spain, Sweden-Norway, Switzerland, Turkey, and the United States of America. The deliberations of this conference, however, had no practical result.²

§ 589. On March 15, 1886, Belgium, Brazil, Italy, Portugal, Serbia, Spain, Switzerland, and the United States of America signed at Brussels a convention³ concerning the exchange of their official documents, and of their scientific and literary publications, in so far as they are edited by the Governments. The same States, except Switzerland, signed under the same date at Brussels a convention⁴ for the exchange of their *journaux officiels ainsi que des annales et des documents parlementaires*. These two conventions are not referred to in the Treaties of Peace, because none of the Central Powers was a party to them, and their applicability is unaffected by the proceedings at the Peace Conference at Paris.

Official
Publica-
tions.

§ 590. In the interest of public health, as endangered by cholera and plague, a number of so-called sanitary conventions have been concluded:—

Sanita-
tion.

(1) On January 30, 1892, Great Britain, Germany, Austria-Hungary, Belgium, Denmark, Spain, France, Greece, Italy, Holland, Portugal, Russia, Sweden-

¹ See Martens, *N.R.G.*, 2nd Ser. xxiv. pp. 167-478.

² On the whole subject, see Janssen, *Les Conventions monétaires* (1911), and Lippert, *Das internationale*

Finanzrecht (1912), pp. 863-901.

³ See Martens, *N.R.G.*, 2nd Ser. xiv. p. 287.

⁴ See Martens, *N.R.G.*, 2nd Ser. xiv. p. 285.

Norway, and Turkey signed the International Sanitary Convention of Venice.¹

(2) On April 15, 1893, Germany, Austria-Hungary, Belgium, France, Italy, Luxemburg, Montenegro, Holland, Russia, and Switzerland signed the Cholera Convention of Dresden ;² but Montenegro has not ratified. Great Britain and other States acceded later.

(3) On April 3, 1894, Great Britain, Germany, Austria-Hungary, Belgium, Denmark, Spain, France, Greece, Italy, Holland, Persia, Portugal, and Russia signed the Cholera Convention of Paris ; an additional declaration was signed at Paris on October 30, 1897.³ Sweden-Norway acceded later.

(4) On March 19, 1897, Great Britain, Germany, Austria-Hungary, Belgium, Spain, France, Greece, Italy, Luxemburg, Montenegro, Turkey, Holland, Persia, Portugal, Roumania, Russia, Serbia, and Switzerland signed the Plague Convention of Venice ; an additional declaration was signed at Rome on January 24, 1900.⁴

(5) For the purpose of revising the previous cholera and plague conventions, and amalgamating them into one document, Great Britain, Germany, Austria-Hungary, Belgium, Brazil, Spain, the United States of America, France, Italy, Luxemburg, Montenegro, Holland, Persia, Portugal, Roumania, Russia, Switzerland, and Egypt signed on December 3, 1903, the International Sanitary Convention of Paris.⁵ Denmark,

¹ See Martens, *N.R.G.*, 2nd Ser. xix. p. 261, and Treaty Ser. (1893), No. 8.

² See Martens, *N.R.G.*, 2nd Ser. xix. p. 239, and Treaty Ser. (1894), No. 4.

³ See Martens, *N.R.G.*, 2nd Ser. xxiv. pp. 516 and 553, and Treaty Ser. (1899), No. 8.

⁴ See Martens, *N.R.G.*, 2nd Ser. xxviii. p. 339, xxix. p. 495, and Treaty Ser. (1900), No. 6. See also Loutti, *La Politique sanitaire internationale* (1906). Attention should

be drawn to a very valuable suggestion made by Ullmann in *R.I.*, xi. (1879), p. 527, and in *R.G.*, iv. (1897), p. 437. Bearing in mind the fact that frequently in time of war epidemics break out in consequence of insufficient disinfection of the battlefields, Ullmann suggests a general convention instituting neutral sanitary commissions whose duty would be to take all necessary sanitary measures after a battle.

⁵ See Martens, *N.R.G.*, 3rd Ser. i. p. 78, and Treaty Ser. (1907), No. 27.

Norway, Sweden, and some other States acceded later. The previous sanitary conventions remain in force for those signatory Powers who do not become parties to this convention.

(6) For the purpose of organising the International Office of Public Health contemplated by the Sanitary Convention of Paris of December 3, 1903, Great Britain, Belgium, Brazil, Spain, the United States of America, France, Italy, Holland, Portugal, Russia, Switzerland, and Egypt signed at Rome, on December 9, 1907, an agreement¹ concerning the establishment of such an office at Paris.² Argentina, Bulgaria, Sweden, and other States acceded later.³ By the Treaties of Peace all these six conventions are to be again applied without modification as between the parties thereto, Bulgaria acceding to those to which she was not a party.⁴

§ 591. On November 29, 1906, Great Britain, Germany, Austria-Hungary, Belgium, Bulgaria, Denmark, Spain, the United States of America, France, Greece, Italy, Luxemburg, Norway, Holland, Russia, Serbia, Sweden, and Switzerland signed at Brussels an agreement concerning the Unification of the Pharmacopœial Formulas for Potent Drugs.⁵ By the Treaties of Peace this convention is to be again applied without modification between the parties to it.⁶

591*a*. In order to regulate the trade in, and control the use of, opium and kindred drugs, a large number of States met at the Hague, and signed, on January 23, 1912, an International Opium Convention.⁷ But the

¹ See Martens, *N.R.G.*, 3rd Ser. ii. p. 913, and Treaty Ser. (1909), No. 6. ² See above, § 471*b*.

³ A further sanitary convention was signed at Paris on January 17, 1912, by a large number of Powers, but does not appear to have been ratified by any (see *B. and F. State Papers* (1914, Part II), p. 230).

⁴ See Treaty of Peace with Germany, Article 282; with Austria,

Article 234; with Bulgaria, Articles 162, 167.

⁵ See Martens, *N.R.G.*, 3rd Ser. i. p. 592, and Treaty Ser. (1907), No. 10.

⁶ See Treaty of Peace with Germany, Article 282; with Austria, Article 234; with Bulgaria, Article 162.

⁷ *Parl. Papers*, Misc., No. 2 (1912).

convention was not brought into force. A further conference was held at the Hague in 1914, and in accordance with resolutions adopted by it, a special protocol was opened for signature, so that the convention might be brought into operation.¹ The World War intervened; but after its conclusion the Treaties of Peace provided that the convention was to come into force immediately. Ratification of the Treaties of Peace was to be regarded as equivalent to ratification of the convention and the signature of the special protocol; and the High Contracting Parties agreed to enact the legislation necessary to give effect to the convention without delay.²

Human-
ity and
Public
Morality.

§ 592. In the interest of humanity and public morality three Unions—although the term ‘Union’ is not made use of in the treaties—have been established, namely, that concerning slave trade, that concerning the so-called white slave traffic, and that concerning obscene publications; but the first of these appears to be no longer in existence.

(1) A treaty concerning slave trade³ was concluded as early as 1841 between Great Britain, Austria, France, Prussia, and Russia. And Article 9 of the General Act of the Berlin Congo Conference of 1885 likewise dealt with the matter. But it was not until 1890 that a Union for the suppression of the slave trade came into existence. This Union was established by the General Act⁴ of the Brussels Conference, signed on July 2, 1890, and possessed two international offices,⁵ namely, the International Maritime Office at Zanzibar and the Bureau Spécial attached to the Foreign Office at Brussels. However, the General Act of the Brussels

¹ *Parl. Papers*, Misc., No. 4 (1915).

² Treaty of Peace with Germany, Article 295; with Austria, Article 247; with Bulgaria, Article 174.

³ See above, § 292.

⁴ See Martens, *N.R.G.*, 2nd Ser. xvi. p. 3, and Treaty Ser. (1892), No. 7.

⁵ See above, § 468.

Conference was repealed as between the parties to a new convention, signed at St. Germain on September 10, 1919, which, while containing an undertaking by them to secure the complete suppression of slavery, and of the slave trade by land and sea, does not provide for the continuance of the machinery established by the Brussels General Act.¹

(2) On May 18, 1904, an agreement for the suppression of the white slave traffic ² was signed at Paris by Great Britain, Germany, Belgium, Denmark, Spain, France, Italy, Holland, Portugal, Russia, and Sweden-Norway. Other States acceded later. A further agreement concerning the subject was signed at Paris on May 4, 1910,³ by thirteen States. These conventions are, according to the Treaties of Peace, to be again applied as between the parties to them without modification, and Bulgaria is to accede.⁴

(3) On December 21, 1904, a large number of States signed at the Hague a convention for the exemption of hospital ships from harbour dues. Great Britain was not a party to this convention.⁵ By the Treaties of Peace this convention is to be again applied without modification, as between the parties to it, and Bulgaria is to accede.⁴

(4) On May 4, 1910, an agreement for the suppression of obscene publications ⁶ was signed at Paris by Great Britain, Germany, Austria-Hungary, Belgium, Brazil, Denmark, Spain, the United States of America, France, Italy, Holland, Portugal, Russia, and Switzerland.

¹ See above, § 564.

² See Martens, *N.R.G.*, 2nd Ser. xxxii. p. 160, and Treaty Ser. (1905), No. 24. See also Butz, *Die Bekämpfung des Mädchenhandels im internationalen Rechte* (1908); Rehm in *Z.V.*, i. (1907), pp. 446-453.

³ See Martens, *N.R.G.*, 3rd Ser. vii. p. 252, and Treaty Ser. (1912), No. 20.

⁴ See Treaty of Peace with Germany, Article 282; with Austria, Article 234; with Bulgaria, Article 167.

⁵ See *B. and F. State Papers*, xcviii. p. 624.

⁶ See Martens, *N.R.G.*, 3rd Ser. vii. p. 266, and Treaty Ser. (1911), No. 11.

Other States acceded later. This convention is, by the Treaties of Peace, to be again applied between the parties to it, Bulgaria acceding.¹

Preservation of
Animal
World.

§ 593. The following general treaties have been concluded for the purpose of preserving certain animals in certain parts of the world :—

(1) In behalf of the preservation of wild animals, birds, and fish in Africa, the Convention of London² was signed on May 19, 1900, by Great Britain, the Congo Free State, France, Germany, Italy, Portugal, and Spain; Liberia acceded later. However, this convention has not yet been ratified, and as it is not referred to in the Treaties of Peace, it may probably be regarded as unlikely to secure ratification.³

(2) In behalf of the prevention of the extinction of the seals and sea-otters in the North Pacific Ocean, the Pelagic Sealing Convention⁴ of Washington was signed on July 7, 1911, by Great Britain, the United States of America, Japan, and Russia. This convention is unaffected by the proceedings at the Peace Conference at Paris, because none of the Central Powers are parties to it.

Private
Inter-
national
Law.

§ 594. Various general treaties have been concluded for the purpose of establishing uniform rules concerning subjects of the so-called Private International Law :—

(1) On November 14, 1896, a general treaty concerning the conflict of laws relative to procedure in civil cases was concluded at the Hague. But this treaty was replaced by the Convention⁵ of the Hague of July 17,

¹ See Treaty of Peace with Germany, Article 282; with Austria, Article 234; with Bulgaria, Article 167.

² See Martens, *N.R.G.*, 2nd Ser. xxx. p. 430.

³ A convention for the protection of migratory birds was signed at Washington on August 16, 1916, between Great Britain (for Canada) and the United States (see Treaty

Ser. (1917), No. 7). A convention was signed at Sophia between Bulgaria and Roumania on November 29, 1901, regarding fishing in the Danube (see Martens, *N.R.G.*, 2nd Ser. xxxiii. p. 277, and Treaty of Peace with Bulgaria, Article 165).

⁴ See above, § 284.

⁵ See Martens, *N.R.G.*, 3rd Ser. ii. p. 243.

1905, which was signed by Germany, Austria-Hungary, Belgium, Denmark, Spain, France, Italy, Luxemburg, Norway, Holland, Portugal, Roumania, Russia, Sweden, and Switzerland.

(2) On June 12, 1902, likewise at the Hague, were signed three conventions ¹ for the purpose of regulating the conflict of laws concerning marriage, divorce, and guardianship. The signatory Powers were Germany, Austria-Hungary, Belgium, Spain, France, Italy, Luxemburg, Holland, Portugal, Roumania, Sweden, and Switzerland.

(3) Again at the Hague, on July 17, 1905, were signed two conventions for the purpose of regulating the conflict of laws concerning the effect of marriage upon the personal relations and the property of husband and wife, and concerning the placing of adults under guardians or curators. The signatory Powers were Germany, France, Italy, Holland, Portugal, Roumania, and Sweden.²

It would appear from the Treaties of Peace that only two of these conventions are to be again applied, namely, the Civil Procedure Convention of July 17, 1905, and the convention for the protection of minors of June 12, 1902; moreover, France, Portugal, and Roumania do not intend to apply the Civil Procedure Convention for the future.³

§ 595. The first Pan-American Conference held at Washington in 1889 created the International Union ⁴ of the American Republics for prompt collection and distribution of commercial information.⁵ This Union

¹ See Martens, *N.R.G.*, 2nd Ser. xxxi. pp. 706, 715, 724.

² Meili and Mamelok, *Das internationale Privat- und Zivilprozessrecht auf Grund der Haager Konventionen* (1911), offers a digest of all the Hague Conventions concerned.

³ See Treaty of Peace with Ger-

many, Articles 282, 287; with Austria, Articles 234, 238.

⁴ This is, of course, unaffected by the proceedings of the Peace Conference at Paris.

⁵ See Barrett, *The Pan-American Union* (1911).

American
Re-
publics.

of the twenty-one independent States of America established an international office at Washington, called at first 'The American International Bureau,' but the fourth Pan-American Conference, held at Buenos Ayres in 1910, changed the name of the office¹ to 'The Pan-American Union.' At the same time, this conference considerably extended² the scope of the task of this bureau, so as to include, besides other objects, the function of a permanent commission of the Pan-American Conferences, which has to keep the archives, to assist in obtaining the ratification of the resolutions and conventions adopted, to study or initiate projects to be included in the programme of the conferences, to communicate them to the several Governments, and to formulate the programme and regulations of each successive conference.

Science.

§ 596. In the interest of scientific research the following Unions³ had been established before the World War, but they are not mentioned in the Treaties of Peace among the treaties of an economic or technical character which are to be again applied as between the parties thereto, either because the conventions creating them had never been officially published, or because there was no desire to bring them into operation again.⁴

(1) On October 30, 1886, Great Britain, Germany, Argentina, Austria-Hungary, Belgium, Denmark, Spain, the United States of America, France, Greece, Italy, Japan, Mexico, Norway, Holland, Portugal, Roumania, Russia, Sweden, and Switzerland signed a convention at Berlin for the purpose of creating an International

¹ See above, § 467*a*.

² See Reinsch, *Public International Unions* (1911), p. 117.

³ The conventions which have created these Unions would seem to be nowhere officially published, and are, therefore, not to be found in the Treaty Series or in Martens. The

dates and facts mentioned in the text are based on private information and such information as can be gathered from the *Annuaire de la Vie internationale* (1908-1909), pp. 389-401.

⁴ The editor has been unable to find any information on this point.

Geodetic Association. As early as 1864 a number of States had entered at Berlin into an association concerning geodetic work in Central Europe, and in 1867 the scope of the association was expanded to the whole of Europe; but it was not until 1886 that the geodetic work of the whole world was made the object of the Geodetic Association. The convention of 1886, however, was revised, and a new convention was signed at Berlin on October 11, 1895.¹ The association, which before the World War arranged an international conference every three years, possessed a central office at Berlin.

(2) On July 28, 1903, was signed at Strasburg a convention for the purpose of creating an International Seismologic Association. This convention was revised on August 15, 1905, at Berlin.² The following States were parties: Great Britain, Germany, Austria-Hungary, Belgium, Bulgaria, Canada, Chili, Spain, the United States of America, France, Greece, Italy, Japan, Mexico, Norway, Holland, Portugal, Roumania, Russia, Serbia, and Switzerland. The association, which before the World War arranged an international conference at least once in every four years, had a central office at Strasburg.

(3) On May 11, 1901, a convention was signed at Christiania for the International Hydrographic and Biologic Investigation of the North Sea.³ The parties were Great Britain, Germany, Belgium, Denmark, Holland, Norway, Russia, and Sweden. The association established a central office.

¹ For the text of this convention, see *Annuaire de la Vie internationale* (1908-1909), p. 390.

² The text of this convention is not published in the *Annuaire de la Vie internationale* (1908-1909), but its

predecessor of 1903 is published there on p. 393.

³ For the text of this convention, see *Annuaire de la Vie internationale* (1908-1909), p. 397.

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